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In the

Supreme Court of the United States

OCTOBER TERM, 1996

ESTEBAN ORTIZ, ET AL.,
Petitioners
v.

FIBREBOARD CORPORATION, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

VOLUME III

(Pp. 436 – 600.)

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

----------------------------------- x

GERALD AHEARN, JAMES DENNIS, :
CHARLES W. JEEP, JAMES ELLISON :
and WILLIAM JAMES MITCHELL, on :
Behalf of Themselves and Others Similarly :
Situated, : Civil Action
Plaintiffs : No.
v. : 6:93cv526
FIBREBOARD CORPORATION and :
BETHLEHEM STEEL CORPORATION :
Defendants, :
:
CONTINENTAL CASUALTY COMPANY,:
CNA CASUALTY COMPANY OF :
CALIFORNIA, COLUMBIA CASUALTY :
COMPANY and PACIFIC INDEMNITY :
COMPANY, Defendant-Intervenors. :
:
OWENS-ILLINOIS, INC., on Behalf
of Itself and Others Similarly Situated, :
Additional Counterclaim :
Defendant. :

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CONCLUSIONS OF LAW

July 27, 1995

CONCLUSIONS OF LAW

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CONCLUSIONS OF LAW

Based in part on the foregoing findings of fact, the Court makes the following conclusions of law.[1]

I. SUBJECT-MATTER JURISDICTION

A. There is a case or controversy

1. There is a justiciable case or controversy so long as there is an "actual antagonistic assertion of rights." United States v. Johnson, 319 U.S. 302, 305 (1943). A controversy exists until "'the issues presented are no longer "live,"'" or "the parties lack a legally cognizable interest in the outcome." Chevron U.S.A., Inc. v. Traillour Oil Co., 987 F.2d 1138, 1153 (5th Cir. 1993) (quoting Powell v. McCormack, 395 U.S. 486, 496 (1969)). The case-or-controversy requirement is met so long as the Court's ruling will affect "tangible legal rights," ASARCO Inc. v. Kadish, 490 U.S. 605, 619 (1989), and the parties do not call upon the Court merely to render an advisory opinion or to opine "what the law would be on an uncertain or hypothetical state of facts." Id. (quoting Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249, 262 (1933)).

2. This matter presents an active "Case" or "Controversy." There is an "actual antagonistic assertion of rights" between and among the parties to this action, see

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[1] To the extent the following conclusions of law include findings of fact or mixed findings of fact and conclusions of law, those findings are hereby adopted by this Court.

Findings of Fact at ¶¶ 1-5; and the Court's ruling will affect their "tangible legal rights" by, inter alia, finally resolving Fibreboard's coverage dispute with Continental and Pacific, enabling the claimant Class to secure access to substantial insurance proceeds and releasing Fibreboard, Continental and Pacific from asbestos-related personal-injury lawsuits. See Findings of Fact at ¶¶ 190-95.

3. That an agreement in principle to settle this action was reached before the complaint was filed does not alter the Court's conclusion. Courts routinely assert jurisdiction over class action settlements and consent decrees filed the very day the related suits are filed. See, e.g., In re Joint Eastern and Southern Dist. Asbestos Litigation ("Manville"), 982 F.2d 721, 728-29 (2d Cir. 1992), modified on other grounds, 993 F.2d 7 (2d Cir. 1983); Carlough v. AmchemProds., Inc., 834 F. Supp. 1437, 1465 (E.D. Pa. 1993), aff'd, 10 F.3d 189 (3d Cir. 1993); see also Swift & Co. v. United States, 276 U.S. 311, 326 (1928); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 833-34 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). Here, the settlement agreement was not signed until approximately four months after the complaint was filed, and after the parties had negotiated vigorously about its terms and the terms of the Trilateral.

4. The case or controversy requirement is met even though numerous Class members are currently unimpaired. Numerous courts have certified classes that include future claimants. See, e.g., In re Agent Orange Product Liability Litigation (Ivy), 996 F.2d 1425 (2d Cir. 1993), cert. denied, 114 S. Ct. 1125; Georgine v. Amchem Prods., Inc., 157 F.R.D. 246 (E.D. Pa/ 1994); In re Joint Eastern and Southern

Dist. Asbestos Litigation, 133 F.R.D. 425 (E.D.N.Y. 1990). Further, numerous courts have certified class actions that include people with no manifest symptoms or injury. See, e.g., In re Silicone Gel Breast Implant Products Liability Litigation (MDL-926), No. CV 92-P-10000-S, 1994 WL 114580 (N.D. Ala. Apr. 1, 1994); In re Joint Eastern and Southern Dist. Asbestos Litigation, Nos. 90-3973; 90-7518, slip op. at 194-96 (E. & S.D.N.Y. Dec. 15, 1994).

B. The amount-in-controversy requirement

5. For diversity jurisdiction to exist, the amount-in-controversy requirement allegations of damage in excess of $50,000 -must be satisfied. 28 U.S.C. § 1332(a). In determining the amount in controversy, "the sum claimed by the plaintiff controls . . . [unless it] appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount." St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938) (emphasis added]. Although the plaintiffs bear the burden of proving the requisite amount in controversy, see Gibbs v. Buck, 307 U.S. 66, 72 (1939); McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936), this burden is not a heavy one, and the plaintiff need demonstrate only that it is not impossible that he or she will recover more than $50,000. See Seafoam, Inc. v. Barrier Systems, Inc., 830 F.2d 62, 66 (5th Cir. 1987) ("It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."). In determining the amount in controversy, claims for punitive damages must be included in the computation. See Bell v. Preferred Life Assur. Soc., 320 U.S. 238, 240 (1943).

6. The amount-in-controversy requirement is satisfied because each Class member could lawfully allege damages in excess of $50,000. The amount-in-controversy requirement may be satisfied in mass-tort class actions, including class actions consisting partly or entirely of people who had not, at the time of filing, manifested any symptoms, illness or injury. See, e.g., Manville, supra, 982 F.2d at 734 (asbestos: amount in controversy requirement satisfied although some members were "exposure only"); Carlough v. Amchem Prods. Inc., supra, 834 F. Supp. at 1456-62 (asbestos: same); In re A.H. Robins Co., Inc., 880 F.2d 709, 724-25 (4th Cir.) (Dalkon Shield: "indisputable that it cannot be said to a 'legal certainty' that the jurisdictional amount herein was not satisfied" where the class included women who had used the shield but who had not yet manifested an injury), cert. denied, 493 U.S. 959 (1989); In re Agent Orange Product Liability Litigation, supra, 996 F.2d at 1434 (Agent Orange); Payton v. Abbott Labs, 83 F.R.D. 382, 395 (D. Mass. 1979) (DES), vacated on other grounds, 100 F.R.D. 336 (D. Mass. 1983); Bowling v. Pfizer, Inc., 143 F.R.D. 141, 167 (S.D. Ohio 1992) (defective artificial heart valves), app. dismissed without op., 995 F.2d 1066 (1993).

7. Even if each class member could not meet the amount-in-controversy requirement, the Court would still have subject matter jurisdiction over this diversity case under the Judicial Improvement Act of 1990, 28 U.S.C. § 1367, because the class representatives meet the amount-in-controversy requirement, and therefore all other class members fall within this Court's supplemental jurisdiction, regardless of the value of their claims. In re Abbott Laboratories, 51 F.3d 524 (5th Cir. 1995).

8. Even if each class member could not meet the amount-in-controversy requirement, and even if the class members did not fall within this Court's supplemental jurisdiction, the amount-in-controversy requirement would still be satisfied for all class members because it is appropriate to aggregate the amounts of the Class members' claims to satisfy the $50,000 jurisdictional amount requirement. The class members share the right to an equitable distribution of the limited resources available to redress their personal injury claims against Fibreboard. See Snyder v. Harris, 394 U.S. 332, 335 (1969). Aggregated, the claims clearly exceed $50,000.

9. That certain jurisdictions do not permit causes of action absent physical injury or limit punitive or other damages in some circumstances does not mean that unimpaired Class members could not lawfully allege damages in excess of $50,000 for such causes of action as medical monitoring, fear of cancer and risk of cancer. A Class member residing in jurisdictions where such causes of action could not be asserted could, for example, bring his or her action in another jurisdiction (such as California, which has personal jurisdiction over Fibreboard) where the causes of action and damages are permitted; make a good faith argument for application of the law or a jurisdiction where the causes of action and damages are permitted; or make a good faith argument for the extension and change of the law. The Court cannot say "to a legal certainty" that such claims -- including their punitive damages component -- are worth less than $50,000.

C. The Insurers' standing to intervene

1. Intervention as of right

10. An applicant must satisfy four requirements to intervene pursuant to Rule 24(a): "(1) the application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit." New Orleans Public Service, Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 463 (5th Cir.) (en banc) (internal quotations omitted), cert. denied, 469 U.S. 1019 (1984). The Insurers have met each of these requirements. Kneeland v. National Collegiate Athletic Ass'n, 806 F.2d 1285, 1289 (5th Cir.), cert. denied, 484 U.S. 817 (1987); Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1124 (5th Cir.), cert. denied, 400 U.S. 878 (1970); Campbell v. Plank, 113 F.R.D. 175, 176 (D. Kan. 1990); Levenfeld v. Clinton, 674 F. Supp. 255, 257, 262 (N.D. Ill. 1987); Roach v. Churchman, 457 F.2d 1101, 1102 (8th Cir. 1972).

2. Permissive intervention

11. Rule 24(b)(2) authorizes permissive intervention in the Court's discretion when "an [intervention] applicant's claim or defense and the main action have a question of law or fact in common," and provides that the court must consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." In considering these factors, the Court concludes the Insurers' permissive intervention is appropriate.

II. CERTIFICATION OF THE HEALTH CLAIMANT CLASS

A. Standards for Class Certification

12. A class may be certified if all four prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure are met and one or more of the provisions of Rule 23(b) is satisfied. "The district court has wide discretion in deciding whether or not to certify a proposed class." Jenkins v. Raymark Industries, Inc., 782 F.2d 468, 471-72 (5th Cir. 1986).

13. The Rule 23 requirements apply to all federal class actions; however, they are often more readily satisfied in the settlement context because the issues for resolution by the Court are more limited than in the litigation context. See In re A.H. Robins Co., Inc., 85 B.R. 373, 378 (E.D. Va. 1988), aff'd, 880 F.2d 709 (4th Cir. 1989); Officers for Justice v. Civil Service Com'n of City and County of San Francisco, 688 F.2d 615, 633 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983); In re Dennis Greenman Securities Litigation, 829 F.2d 1539, 1543 (11th Cir. 1987); Bowling, supra, 143 F.R.D. at 158; see also 2 Newberg on Class Actions § 11.28 (3rd ed. 1992); but see In re General Motors Corporation, ___F.3d___, 1995 WL 223209, 63 U.S.L.W. 2659 (3rd Cir. 1995) (rejecting liberalized criteria for settlement classes). Courts have approved settlements and finally certified settlement classes while at the same time holding that class certification for litigation purposes might be improper. See, e.g., Officers for Justice, supra, 688 F.2d at 633; In re Anthracite Coal Antitrust Litigation, 79 F.R.D. 707, 713-14 (M.D. Pa. 1978) (court approved class settlement while noting that certification for

litigation purposes would be doubtful), aff'd in part mem. and vacated in part mem. sub nom. Colonial Fuel Co. v. Blue Coal Corp., 612 F.2d 571 (3d Cir. 1979) (table); Wilkes-Barre Steam Heat Co. v. Blue Coal Corp., 612 F.2d 576 (3d Cir. 1979)(table).

B. Rule 23(a) prerequisites

14. Rule 23(a) provides that a class action may be brought if: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

1. Numerosity

15. The numerosity requirement of Rule 23(a) is satisfied. Given the size of the class (Findings of Fact at ¶ 278) joinder of the class members' claims would plainly be impracticable. See Boykin v. Georgia-Pacific Corp., 706 F.2d 1384, 1386 (5th Cir. 1983), cert. denied, 465 U.S. 1006 (1984) (317-member class met numerosity requirement).

2. Commonality

16. Rule 23(a) requires that there be at least one legal or factual issue common to all class members. See 3B J. Moore and J. Kennedy, Moore's Federal Practice ¶ 23.06-1, at 23-159-23-160 (2d ed. 1993); Jenkins, supra, 782 F.2d at 472 ("The threshold of commonality is not high," as "the Rule

requires only that resolution of the common questions affect all or a substantial number of the class members"); Walker v. Jim Dandy Co., 638 F.2d 1330, 1336 (5th Cir. 1981). The commonality requirement may be more readily satisfied in the settlement context than in the litigation context. See Conclusions of Law at ¶ 13.

17. There are questions of law and fact common to the class. All Class members here have an overriding common interest in eliminating the risk posed by the coverage litigation and creating a substantial fund of insurance proceeds to provide compensation for Class members. Findings of Fact ¶¶ 4, 34, 54, 57, 225, 278, 346. Consequently, many major issues presented by the Class are common to all of its members, including whether claimants against Fibreboard have a right to substantial insurance proceeds notwithstanding the existence of a coverage dispute; and whether some curtailment of the Class's rights in the tort system is appropriate in order to enable a resolution of the coverage dispute that equitably distributes substantial insurance proceeds. See Georgine, supra, 157 F.R.D. at 316; 2 Newberg on Class Actions § 11.28, at 11-58-11-60. See also Jenkins, supra, 782 F.2d at 473 (affirming class certification of limited issues including liability but not damage and causation).

2. Typicality

18. "The 'typicality' requirement focuses . . . on the similarity of the legal and remedial theories behind [the named and unnamed plaintiffs'] claims." Jenkins, supra, 782 F.2d at 472. Consequently, in the settlement context, it "requires proof that the interests of the class representatives and

the class are commonly held for purposes of receiving similar or overlapping benefits from a settlement." 2 Newberg on Class Actions § 11.28, at 11-58; see also Conclusions of Law at ¶ 13 (typicality more readily satisfied in the settlement context). The requirement may be met even though "[t]he degree of harm may differ between the representatives and members of the class according to the degree of exposure (if any), the effects of the asbestos disease process, and the nature of the disease contracted by the individual." Jenkins v. Raymark Indus., Inc., 109 F.R.D. 269, 272 (E.D. Tex. 1985), aff'd, 782 F.2d 468 (5th Cir. 1986); see also Ladd v. Dairyland County Mut. Ins. Co. of Tex., 96 F.R.D. 335, 337 (N.D. Tex. 1982). The legal and remedial theories of the representative plaintiffs are typical of the Class. All Class members' claims arise from exposure to asbestos for which Fibreboard may bear legal liability, and all have a common interest in eliminating the common risk posed by the coverage litigation and securing the maximum possible insurance proceeds. See Jenkins, supra, 782 F.2d at 472.

4. Adequacy of Representation

19. The adequacy requirement contains two elements: "The first concerns the qualifications of counsel, and the second concerns the relationship between the interests of the class representatives and the interests of the other class members." Jenkins, supra, 109 F.R.D. at 273.

a. Class Counsel

20. Class Counsel are highly competent, skilled and experienced members of the plaintiffs' asbestos bar and were exceedingly well qualified to serve as Class Counsel in

this case. Findings of Fact at ¶¶ 293-97. As set forth more fully below, Class Counsel adequately represented the class. See Conclusions of Law at ¶¶ 60-68.

b. Class representatives

21. Class representatives satisfy the adequacy requirement unless they have "an insufficient stake in the outcome or interests antagonistic to the unnamed members." Jenkins, supra, 782 F.2d at 472; see also Georgine, supra, 157 F.R.D. at 317 ("The key question is whether their interests are antagonistic.") (quoting Steiner v. Equimark Corp., 96 F.R.D. 603, 610 (W.D. Pa. 1983)) (emphasis in original). And "so long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes." In re Corrugated Container Antitrust Litigation, 643 F.2d 195, 208 (5th Cir. 1981).

22. The Court concludes that the Class representatives have a sufficient stake in the outcome and that the interests of the Class representatives and the members of the class are not antagonistic. The Class representatives span the range of the various medical categories under the Trust Distribution Process and include both already-impaired and not-yet-impaired claimants. Findings of Fact at ¶¶ 279-88. The class representatives and the members of the class -- all of whom are equally at risk in the coverage litigation -- are united in seeking the maximum possible recovery for their asbestos-related claims. See Jenkins, supra, 109 F.R.D. at 274.

23. The class representatives adequately represent those Class members whose injuries have not yet become manifest. The Complaint is expressly brought on behalf of unimpaired Class members; and unimpaired Class members have interests in the global settlement common with each of the Class representatives and are united with them in eliminating the risk of the coverage litigation by seeking the maximum possible settlement for the entire Class. Findings of Fact at ¶¶ 346, 361.

24. The Class representatives played a sufficient role in the action, notwithstanding that they were named after the agreement in principle was reached and that they relied on Class Counsel in the subsequent settlement negotiations. See Findings of Fact at ¶¶ 279-88. "It is not a requirement that representative plaintiffs have specific knowledge of the claims and issues in the action, or that they play a personal role in the direction and management of the action." Georgine, supra, 157 F.R.D. at 317. See Longden v. Sunderman, 123 F.R.D. 547, 559 (N.D. Tex. 1988) (the law well recognizes that, in "complex" matters, "it is unreasonable to expect the class representatives to possess detailed, personal knowledge"); Gibb v. Delta Drilling Co., 104 F.R.D. 59, 77 (N.D. Tex. 1984). "[T]he primary criterion for determining whether the class representative has adequately represented the class . . . is whether the representative through qualified counsel, vigorously and tenaciously protected the interests of the class." Gonzales v. Cassidy, 474 F.2d 67, 75 (5th Cir. 1973) (emphasis added); accord Sunderman, supra, 123 F.R.D. at 559); Durrett v. John Deere Co., 150 F.R.D. 555, 558 (N.D. Tex. 1993).

C. Certification of the Class under Rule 23(b)(1)(B)

1. The history of mandatory class actions in federal court

25. The federal courts have traditionally employed mandatory class actions to achieve, through a unitary resolution, equitable distribution of assets in which large numbers of claimants have a "common interest." eg., Smith v. Swormstedt, 57 U.S. (16 How.) 288, 302-03, 309 (1854); Hartford Life Ins. Co. v. Ibs, 237 U.S. 662, 670-72 (1915); see also, e.g., Leadville Coal Co. v. McCreery, 141 U.S. 475, 478 (1891); Dickinson v. Burnham, 197 F.2d 973, 980 (2d Cir. 1952).

26. Judgments in class actions seeking equitable distribution of assets in which all claimants share a "common interest" are binding on all class members, even though class members' claims are a collection of money damage claims, and even though many of the class members lack any connection with the forum court. Smith, supra, 57 U.S. at 300-03; Ibs, supra, 237 U.S. at 672; see also Leadville, supra, 141 U.S. at 478; Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 367 (1921).

27. The Supreme Court and federal appellate courts have consistently upheld traditional mandatory class actions of this and related nature, provided the absent class members were adequately represented. See e.g., Hansberry v. Lee, 311 U.S. 32 (1940); Sovereign Camp of the Woodmen of the World v. Bolin, 308 U.S. 66, 78-79 (1938); Supreme Tribe of Ben Hur, supra; Hartford Life Insurance Co. v. Barber, 245 U.S. 146, 149 (1917); Supreme Council of the Royal Arcanum v. Green, 237 U.S. 531, 542-43 (1915); see also Kincade v.

General Tire and Rubber Co., 635 F.2d 501, 506-08 (5th Cir. 1981); *Robertson* v. *National Basketball Ass'n*, 556 F.2d 682, 685-86 (2d Cir. 1977); *see also* *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950) (in suit for judicial settlement of accounts, the need for a unitary and final adjudication "[could] be served *only if interests or claims of individuals who are outside of the State could somehow be determined*" and, hence, "[a] construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified") (emphasis added).

28. The rules of procedure applicable in the federal courts have long endorsed the traditional role of mandatory class actions in achieving equitable distribution of assets among multiple claimants.

(a) In the years prior to the adoption of the Federal Rules of Civil Procedure, Federal Equity Rule 38 (adopted in 1912), under which "[l]imited fund and other no opt-out class actions were recognized," provided that "'absent parties could be bound by . . . judgments pursuant to this provision.'" 1 *Newberg on Class Actions*, *supra*, §1.09 at 1-24 (quoting *In re Joint Eastern and Southern Dist. Asbestos Litigation* ("*Manville*"), 129 B.R. 710, 804 (E. & S.D.N.Y. 1991), *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992), *modified*, 993 F.2d 7 (2d Cir. 1993)).

(b) Original Rule 23 (contained in the 1938 version of the Federal Rules of Civil Procedure) preserved the binding nature of traditional class actions, including those seeking equitable distribution of assets. In addition, Rule 23 for the first time extended the class-action mechanism to actions at law, and in doing so created a new category of nonbinding class action. The Rule thus distinguished among three types of actions: "true," "hybrid," and "spurious." The first two of these categories were mandatory -- *i.e.*, they encompassed the traditional binding, no-opt-out class actions recognized by the case law; the third, "spurious," category, was essentially a permissive joinder device, binding class members only if they affirmatively opted *into* the class. 1 *Newberg on Class Actions*, *supra*, § 1.09 at 1-26 1-27; 3B James Moore & John E. Kennedy, *Moore's Federal Practice* ¶ 23.31[1], at 23-235 (1992); *see also Dickinson*, *supra*, 197 F.2d at 979-80 (class actions seeking equitable distribution of assets were binding, or mandatory, under the 1938 version of Rule 23).

(c) The 1966 amendments to Rule 23 promulgating the current form of Rules 23(b)(1) and 23(b)(2) preserved the "true" and "hybrid" categories in slightly modified form. Those sections of the Rule accordingly encompass traditional class actions and preserve their mandatory, non-opt-out quality. "Spurious" actions, by contrast, were replaced by the present Rule 23(b)(3) "common question" class action. *See* Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 43 (1967); 3B *Moore's Federal Practice*, *supra*, ¶ 23.31[1], at 23-235; *see also* 1 *Newberg on Class Actions*, *supra*, § 1.09 at 1-25 ("Antecedents of the modern limited fund class action may be found in the hybrid class suit [under prior Rule 23].").

29. Class actions certified pursuant to Rules 23(b)(1) and 23(b)(2) are thus predominantly equitable in nature. *See* 1 *Newberg on Class Actions*, *supra*, § 1.19 at 1-46. For example, as to cases under subdivision (b)(1)(B): "though

they involve money claims individually," such cases are in essence actions "to allocate pro rata an available fund that is insufficient to pay all claims," and therefore "are equitable in nature," id. § 1.18 at 1-47. See also, e.g., Manville at 832.

2. Application of Rule 23(b)(1)(B)

30. Rule 23(b)(1)(B) calls for certification of a mandatory class if the prerequisites of Rule 23(a) are met and:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of. . .
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

31. This Rule is to be interpreted according to its "plain meaning." See, e.g., Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 123 (1989). As used in the Rule, the requisite "risk" of impairment need not be a certainty or even a better-than 50% likelihood. Instead, the term "risk" refers only to a "substantial probability," which has been described as "more than a mere possibility" but "less than a preponderance." Manville, supra, 129 B.R. at 765; accord In re

Granada Partnership Securities Litigation, 803 F. Supp. 1236, 1244 (S.D. Tex. 1992); In re Joint Eastern and Southern Dist. Asbestos Litigation ("Eagle-Picher"), 134 F.R.D. 32, 35 (E. & S.D.N.Y. 1990); In re First Commodity Corp. of Boston Customer Account Litigation, 119 F.R.D. 301, 312 (D. Mass. 1987); Jenkins, supra, 109 F.R.D. at 276-77; In re Jackson Lockdown/MCO Cases, 107 F.R.D. 703, 713 (E.D. Mich. 1985); In re "Agent Orange" Product Liability Litigation, 100 F.R.D. 718, 726 (E.D.N.Y. 1983), aff'd, 818 F.2d 145 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988).

a. Risk resulting from the coverage litigation

32. If separate actions by Class members were permitted, there would be a risk that early individual adjudications would consume all available assets, and that Class members who won the race to the courthouse would achieve recoveries denied to thousands of later claimants. That risk would exist whether the coverage litigation were to proceed or whether the Trilateral Agreement were approved. Findings of Fact at ¶¶ 225-30, 233-36, 238, 274.

33. The risk that available funds could be inadequate to pay all claims constitutes a risk of "substantial[] impair[ment]" under rule 23(b)(1)(B). The need to protect Class members' "common interests" in the insurance proceeds subject to the coverage dispute demands a unitary resolution permitting equitable distribution; mandatory class certification is thus appropriate for the same reasons as have been invoked throughout history. Conclusions of Law ¶¶ 25-29, and cases cited therein. Numerous courts applying Rule 23(b)(1)(B) have

certified classes under the Rule where allowing separate actions would have crated a risk that early individual adjudications would have exhausted all available assets.[2]

34. Rule 23(b)(1)(B) certification does not require a fixed asset or piece of property in which all class members have a preexisting interest. See, e.g., In re Drexel Burnham Lambert Group, Inc., 130 B.R. 910, 920 (S.D.N.Y. 1991) and 960 F.2d 285, 292 (2d Cir. 1992); In re Silicone Gel, supra; In re Granada, supra, 803 F. Supp. at 1244; County of Suffolk, supra, 710 F. Supp. at 1418; Eagle-Picher, supra, 134 F.R.D. at 34; Coburn, supra, 77 F.R.D. at 45. See also Newburg on Class Actions, supra, §17.15A at 3S-27-28.

35. The Global Settlement resolves both the insurance coverage dispute between Fibreboard and the insurers, and the claims of all class members against Fibreboard and the insurers. The Global Settlement involved a uniquely situated defendant in a mass tort that has created unparalleled problems for the courts and the litigants. The Global Settlement resulted

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[2] See, e.g., Manville, supra, 982 F.2d 721, 738-39 (2d Cir. 1992); In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 292 (2d Cir. 1992), cert. dismissed, 113 S. Ct. 1070 (1993); In re Silicon Gel Breast Implant Products Liability Litigation (MDL) 926), CV 93-P-11433-S (N.D. Ala., June 1, 1993); In re Granada Partnerships Securities Litigation, 803 F. Supp. 1236, 1244 (S.D. Tex. 1992); Eagle-Picher, supra, 134 F.R.D. at 35; County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407, 1418 (E.D.N.Y. 1989), aff'd, 907 F.2d 1295 (2d Cir. 1990); Bush v. Rewald, [1986-87 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,999 (D. Haw., Sept. 4, 1986); In re Jackson Lockdown/MCO Cases, 107 F.R.D. 703, 712-13 (E.D. Mich. 1985); Coburn v. 4-R Corp., 77 F.R.D. 43, 45-46 (E.D. Ky. 1977). See also Jenkins v. Raymark Indus., Inc., 109 F.R.D. 269, 276 (E.D. Tex. 1985), aff'd, 782 F.2d 468 (5th Cir. 1986) ((b)(1)(B) certification is appropriate where "the brink of insolvency will be reached during the litigation").

from a unique set of circumstances not likely to be repeated. Findings of Fact at ¶¶ 269-72. Resolution of the insurance dispute required a unitary settlement in a proceeding in which all claims were compromised. On these facts, allowance of individual adjudications by class members would have destroyed the opportunity to compromise the insurance coverage dispute by creating the settlement fund, and would have exposed the class members to the very risks that the settlement addresses -- a situation that falls squarely under Rule 23(b)(1)(B). See In re Jackson Lockdown, 107 F.R.D. at 708, 712; In re A.H. Robins, 85 B.R. at 380.

36. Whether mandatory class certification is appropriate in the typical case where a class action is settled with a defendant's own funds, or with insurance funds that are not the subject of genuine and vigorous dispute, is not at issue in this case. In such a case, if the settlement failed because separate actions were permitted, the defendant would retain the settlement funds (or the insurance coverage), and, provided that the defendant had adequate funds to pay all class members' claims, there might be no "impair[ment]," substantial or otherwise, to class members' "ability to protect their interests." Instead, the class members could go out and secure whatever is their due through litigation. The destruction of the settlement fund here, in contrast, constitutes a "risk" within the meaning of rule 23(b)(1)(B) because the source of that fund (and any meaningful recovery for the Class) is a non-defendant whose obligations are seriously in doubt and may well disappear entirely if the settlement were to fall through -- with the result that Class members could then not secure their due through litigation.

b. *Limited fund*

37. A class may be certified under Rule 23(b)(1)(B) irrespective whether a "limited fund" may be said to exist. *See* *White* v. *National Football League*, 822 F. Supp. 1389, 1411 (D. Minn. 1993), *aff'd on other grounds*, 41 F.3d 402 (8th Cir. 1994); *Specialty Cabinets & Fixtures* v. *American Equitable*, 140 F.R.D. 474, 477 (S.D. Ga. 1991). Because separate actions would create a risk of "substantial[] impair[ment]" to Class members, it is not necessary for the Court to analyze the case in terms of the existence of a "limited fund."

38. Alternatively, the disputed insurance asset liquidated by the $1.535 billion Global Settlement may be viewed as a "limited fund" requiring equitable distribution through mandatory class certification under rule 23(b)(1)(B). That "limited fund" resulted from incontrovertibly arms'length bargaining that liquidated the insurance coverage, which was subject to massive, protracted and on-going litigation. Findings of Fact at ¶¶ 36-47, 89-181, 203. *See, e.g.*, *In re A.H. Robins*, *supra*, 880 F.2d at 741 (settlement of coverage dispute "creat[ed] a fund in which all [class members] would have a common interest. This is the classic type of 'limited fund' embraced within the authorization of subsection (b)(1)(B) of Rule 23"); *cough*. *In re Granada*, *supra*, 803 F. Supp. at 1244 (assigning zero value to "claims of additional insurance" in determining whether insurance fund was a limited fund because "the prospects for success [on those claims] are uncertain").

39. Alternatively, the "limited fund" may be viewed as the sum of the value of Fibreboard plus the value of

its insurance coverage. See In re "Agent Orange" Product Liability Litigation, 100 F.R.D. 718, 724 (E.D. N.Y. 1983) (noting that in mass tort litigation, the "limited fund" is generally construed to be the assets of the defendants as extended by insurance coverage and the insurer's assets). Where insurance coverage is disputed, it is appropriate to value the insurance asset at a settlement value. See In re A.H. Robins, supra, 880 F.2d 709. The sale value of Fibreboard is at most $235 million. Findings of Fact at ¶ 265. The funds available to resolve Global Health Claimant Class claims under the Trilateral Settlement, after allowance is made for resolution of unsettled present claims and other items under the Trilateral Settlement, are approximately equal to the funds available under the Global Settlement, so the insurance asset may be valued at no more than $1.535 billion. Findings of Fact at ¶ 232. Under this scenario, the limited fund would equal at most approximately $1.77 billion.

40. As there is a significant risk that the "limited fund" would be insufficient in the tort system, Rule 23(b)(1)(B) certification is in order. See, e.g., In re A.H. Robins, supra, 880 F.2d at 741; In re Granada, supra, 803 F. Supp. at 1244; Bush, supra, [1986-87 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,999.

c. The Intervenors' objections

41. Mandatory class certification does not violate the Rules Enabling Act, 28 U.S.C. § 2072. Class members' substantive rights to full in personam judgments are not being "abridged" because an "arbitrary limit" is being set on the amount of damages that some class members might receive

in the tort system. Mandatory class certification under Rule 23(b) (1)(B) of the Rules of Civil Procedure will not set any such limit on tort system rights: the settlement will. Every settlement involves such a compromise.

42. That Fibreboard retains most of its equity under the Global Settlement is irrelevant to the propriety of mandatory class certification. The Court need not ensure that a defendant designate a particular source of its assets to satisfy the class' claims; the Court need only determine whether the amount recovered by the class is fair. Drexel, supra, 960 F.2d at 293. There is no authority or reason why Class Counsel may settle a 23(b)(1)(B) class action only if all of the defendant's resources are included in the settlement. Such a rule would make no sense, would discourage settlements and has been rejected. See, e.g., In re Granada, supra, 803 F. Supp. at 1244; Bush, supra, [1986-87 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,999. In terms of the expected recovery for class members, the Global Settlement is far superior to either the Trilateral Settlement or to no settlement at all. Findings of Fact at ¶¶ 222 243. Moreover, the Class here has in substance been given value equal to all of Fibreboard's equity. Findings of Fact at ¶ 171.

43. Potential insolvency does not make Rule 23(b)(1)(B) inapplicable. See Manville, supra, 982 F.2d at 737-39; Drexel, supra, 960 F.2d at 292. The Rule was intended to operate in potential insolvency situations. See Advisory Committee Notes to Proposed 1966 Amendments to Federal Rules of Civil Procedure, reprinted in 39 F.R.D. 69, 101 (1966) (Rule 23(b)(1)(B) "applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the

property to his claim, when the debtor's assets are insufficient to pay all creditors' claims") (emphasis added). The Bankruptcy Code disclaims exclusivity and allows for nonbankruptcy alternatives. See 11 U.S.C. § 305(a)(1); see also, e.g., H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 325 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 35 (1978); In re Colonial Ford, Inc., 24 B.R. 1014 (Bank. D. Utah 1982); In re Michael S. Starbuck, Inc., 14 B.R. 134, 135 (Bankr. S.D.N.Y. 1981). The holding in In re Joint Eastern and Southern Dist. Asbestos Litigation (Keene), 14 F.3d 726 (2d Cir. 1993), is not to the contrary. Dictum in that case pertaining to the purported exclusivity of bankruptcy is (a) refuted by Second Circuit precedent (Manville, supra, 982 F.2d at 736-39; Drexel, supra, 960 F.2d at 292) and (b) irrelevant to this case, where bankruptcy was not a viable option for the Class. Findings of Fact at ¶¶ 35, 264.

44. The exercise of jurisdiction over people unknown or unborn is essential, not only, for example, to settle disputes, quiet title and effect equitable distributions, but also to protect and further the interests of the unknowns and unborns. Courts have properly invoked their equitable power in class actions or other cases involving multiple claimants where members of the class are unknown, unborn or incompetent, so long as those members have been adequately represented. See, e.g., Klugh v. U.S., 818 F.2d 294, 301 (4th Cir. 1987); Hatch v. Riggs Nat. Bank, 361 F.2d 559, 565 (D.C. Cir. 1966); Meyer v. Citizens & Southern Nat. Bank, 677 F. Supp. 1196, 1200 (M.D. Ga. 1988); Mabry v. Scott, 124 P.2d 659, 664 (Cal. App.), cert. denied, 317 U.S. 670 (1942). This Court's judgment may bind people who may not yet know whether they have been injured by asbestos or unborn people, so long as appropriate procedures

are used, such that those people are adequately represented. See, e.g., Hatch, supra, 361 F.2d at 565-66.

45. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), does not require that the Class members be afforded an opportunity to opt-out. In traditional, unitary class actions (i.e., actions of the type within Rules 23(b)(1) and 23(b)(2)) absent class members' due process rights are satisfied so long as they receive adequate representation. See Hansberry, supra; Hartford Live Insurance Co. v. Ibs, supra; Smith v. Swormstedt, supra; Kincade v. General Tire & Rubber Co., 635 F.2d 501 (5th Cir. 981); see also Restatement (Second) of Judgments, § 41(1)(e) & (2); id., Comment f.

46. Shutts did not change this long-standing rule, rather it endorsed the Hansberry standard. See 472 U.S. at 808. Shutts held only that in connection with class actions seeking wholly or predominantly damages -- that is, class actions brought pursuant to the state-law analogues of Federal Rule of Civil Procedure 23(b)(3) -- plaintiffs beyond the jurisdictional reach of the court must be given a right to opt out of the class. See Phillips Petroleum v. Shutts, supra, 472 U.S. at 811. Shutts did not apply to class actions -- such as the one before the Court -- seeking equitable relief. See id. at 811 n.3 ("Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief" (emphasis added)). See also In re Agent Orange, supra, 996 F.2d at 1435.

47. If the Supreme Court had intended its holding in Shutts to apply to cases arising under sections other than Rule 23(b)(3), thereby changing years of practice and effectively invalidating many of the types of cases customarily brought under Rules 23(b)(1) and 23(b)(2), it would have said so. See 1 Newberg on Class Actions, supra, § 1.21 at 1-49. Many other courts have concluded that Shutts does not have this effect. See, e.g., Crawford v. Honig, 37 F.3d 485, 487 n.2 (9th Cir. 1994); Grimes v. Vitalink Communications Corp, 17 F.3d 1553, 1560 (3d Cir. 1994); Arnold v. United Artists Theater Circuit, 1994 U.S. Dist. LEXIS 15345 (N.D. Cal. September 15, 1994); White v. National Football League, 822 F. Supp. 1389, 1410-12 (D. Minn. 1993), aff'd on other grds., 41 F.2d 402 (8th Cir. 1994); Nottingham Partners v. Dana, 564 A.2d 1089, 1101 (Del. Super. Ct. 1989); Manville, supra, 129 B.R. at 832; In re Jackson Lockdown/MCO Cases, supra, 107 F.R.D. at 713-14 (E.D. Mich. 1985); County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1302-05 (2d Cir. 1990). But see Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992), cert. dismissed as improvidently granted, 114 S. Ct. 1359 (1994); Waldron v. Raymark Indus., inc., 124 F.R.D. 235 (N.D. Ga. 1989).

48. Shutts is inapplicable for yet another reason. Shutts involved a 23(b)(3)-analogue class action brought in Kansas state court, and resolved the question of the due process rights of class members who did not have minimum contacts with Kansas. This, however, is a federal court, and therefore the appropriate focus is on the question of minimum contacts with the nation. Federal courts can exercise adjudicatory power at least with respect to all persons and property located in the United States. United States v. Union

Pac. R. Co., 98 U.S. 569, 604 (1878). See also Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 442 (1946); Robertson v. Railroad Labor Bd., 268 U.S. 619, 622 (1925); Toland v. Sprague, 37 U.S. (12 Pet.) 300, 328 (1838).

49. Rule 23 authorizes the federal courts to certify nationwide class actions. See Califano v. Yamasaki, 442 U.S. 682, 702 (1979). This is a class action in a federal court, Rule 23 is fully applicable, and therefore the Court has jurisdictional power over the nationwide class, regardless of whether the individual class members have minimum contacts with Texas.

d. Conclusion

50. The Health-Claimant Class should be certified for settlement purposes under Rule 23(b)(1)(B) with respect to its affirmative claims.

D. Rule 23(c)(4): No Need for Subclasses

51. Rule 23(c)(4)(B) of the Federal Rules of Civil Procedure provides that "a class may be divided into subclasses" "where appropriate." The decision whether to subclass rests within the discretion of the district court. See, e.g., Clark Equip. Co. v. International Union, Allied Indus. Wkrs. of America, 803 F.2d 878, 880 (6th Cir. 1986), cert. denied, 480 U.S. 934 (1987); Mendoza v. Tucson School Dist. No. 1, 623 F.2d 1338, 1349-50 (9th Cir. 1980), cert. denied, 450 U.S. 912 (1981). "Subclassing," however, "is not encouraged," (Long Island Lighting Co., supra, 710 F. Supp. at 1447; Georgine, supra, 157 F.R.D. at 318), because it "often

leads to more complex and protracted litigation" (Clark, supra, 803 F.2d at 880) and "compound[s] confusion and cost," County of Suffolk, supra, 710 F. Supp. at 1447; see, e.g., In re Agent Orange Product Liability Litigation, supra, 996 F.2d 1425, 1436 (2d Cir. 1993); Manual for Complex Litigation, § 30.16, at 206. There is a presumption against subclassing: "a certified class is assumed to be sufficiently harmonious and unified in interest that one set of attorneys can and should represent it adequately." Fisher v. Procter & Gamble Mfg. Co., 613 F.2d 527, 547 (5th Cir. 1980), cert. denied, 449 U.S. 1115 (1981). This presumption is overcome only when the proponent of subclassing successfully bears the burden of demonstrating that class members have potentially antagonistic interests and that subclasses "will materially improve the litigation." Clark, supra, 803 F.2d at 880; see United States Parole Commission v. Geraghty, 445 U.S. 388, 408 (1980) (proponent of subclassing bears burden on issue); Manual for Complex Litigation, § 30.16, at 206 ("The court should authorize . . . subclasses only to the extent that the need is clearly demonstrated."). The intervenors have not borne this burden. Findings of Fact at ¶¶ 344-69. See In re Corrugated Containers Antitrust Litigation, supra, 643 F.2d at 208; Manville, supra, 993 F.2d at 9-11; Georgine, supra, 157 F.R.D. at 318. Neither the Ortiz Intervenors nor the Maritime Intervenors have met this burden.[3]

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[3] The Maritime Intervenors have provided no reason why a maritime subclass is necessary, and the Court rejects their request for one. The Maritime Intervenors' position appears to be based upon McDermott, Inc. v. AmClyde, Inc., 114 S. Ct. 1461 (1994), which, they contend, established a unique judgment reduction rule for maritime law. McDermott, however, established no such rule. Even if it had, the Maritime Intervenors' demand for a subclass would still fail because the Global Settlement preserves all applicable judgment reduction rules; so, if there were a special maritime rule, it would not be affected

(continued...)

E. Conclusion

52. It is proper to grant final certification to the mandatory settlement class defined in the Global Settlement Agreement.

III. FAIRNESS OF THE SETTLEMENT

A. Factors for assessing fairness

53. Federal Rule of Civil Procedure 23(e) requires the Court to determine whether a class action settlement is "fair, adequate and reasonable." Parker v. Anderson, 667 F.2d 1204, 1209 (5th Cir.), cert. denied, 459 U.S. 828 (1982); In re Corrugated Container Antitrust Litigation, supra, 643 F.2d at 207. The Court cannot modify the terms of the proposed settlement; rather, the Court must approve or disapprove of the proposed settlement "as a whole." See, e.g., Evans v. Jeff D., 475 U.S. 717, 727 (1986); Holmes v. Continental Can, 706 F.2d 1144, 1160 (11th Cir. 1983); Cotton v. Hinton, 559 F.2d 1326, 1331-32 (5th Cir. 1977).

54. There is a strong presumption in favor of the settlement's fairness. Parker, supra, 667 F.2d at 1209; Cotton v. Hinton, supra, 559 F.2d at 1331; Mashburn v. National Healthcare, Inc., 684 F. Supp. 660, 667 (M.D. Ala. 1988); Manual for Complex Litigation, § 30.41 (2nd ed. 1985).

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[3] (...continued)
by the Global Settlement.

55. The proposed settlement is not required to "achieve some hypothetical standard constructed by imagining every benefit that might someday be obtained in contested litigation." United States, supra, 517 F.2d at 850. Rather, "compromise is the essence of settlement," and the Court may "rely upon the judgment of experienced counsel for the parties." Cotton, supra, 559 F.2d at 1130 (some citations omitted).

56. The Fifth Circuit has set forth six factors to guide the Court's assessment of the fairness, reasonableness and adequacy of a proposed class-action settlement:

> (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of class counsel, class representative and absent class members.

Reed v. General Motors Corp., 703 F.2d 170, 172 (5th Cir. 1983). All factors support approval of the Global Settlement here. Findings of Fact at ¶¶ 89-181, 203 (no fraud or collusion); ¶¶ 11-21 (complexity); ¶¶ 23-26, 33 (discovery); ¶¶ 36-57, 222-43, 255-59 (recovery); ¶ 203 (knowledgeable opinion).

B. The objections to the settlement's fairness

57. The Ortiz Intervenors contend that the settlement is unfair because Class members are giving up rights they would otherwise have: to obtain punitive damages and preand post-judgment interest against Fibreboard; to hold Fibreboard liable for other manufacturers' liability share; to obtain more than $500,000 in compensatory damages from Fibreboard; to file suit in the tort system immediately; and to pursue Fibreboard itself. The settlement is not unfair simply because the Class gave something up; the question is whether the Class received enough in return. As a practical matter, none of the surrendered rights was of great consequence to the Class. See Findings of Fact at ¶¶ 255-59. The benefits of the settlement to the Class, described above and in the Findings of Fact, greatly outweigh the concessions made by the Class.

58. The Ortiz Intervenors also argue that the existence of the Trilateral Agreement obviates any need or justification for these concessions. The Trilateral was entered into as a back-up to the Global Settlement, not an alternative, and the Court takes the settlement as the parties negotiated it. See Evans v. Jeff D., supra; Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1172 (5th Cir. 1978). In addition, the Court has found that the Trilateral Agreement would provide hundreds of millions of dollars less to the Class as a whole, presents a significant risk of leaving many Class members with no recovery at all, and subjects Class members to the inefficiencies, burdens and delays of the tort system. Findings of Fact at ¶¶ 231-39.

C. Conclusion

59. The proposed settlement is fair, adequate, and reasonable to the class within the meaning of Rule 23(e).

IV. ADEQUACY OF COUNSEL

60. In order to approve the Global Settlement, the Court must be satisfied that Class Counsel adequately represented the Class. Conclusions of Law at ¶¶ 14, 19, 20. Under the applicable test, the fairness of the Global Settlement establishes a rebuttable presumption that Class Counsel adequately represented the Class. "It is, ultimately, in the settlement terms that . . . adequacy of [] representation is either vindicated or found wanting. If the terms themselves are fair, reasonable and adequate, the district court may fairly assume that they were negotiated by competent and adequate counsel." In re Corrugated Container, supra, 643 F.2d at 212; accord Parker, supra, 667 F.2d at 1211; Mars Steel Corp. v. Continental Ill. Nat. Bank & Trust Co., 834 F.2d 677, 684 (7th Cir. 1987).

61. There is no evidence here that Class Counsel's clients other than the Class lacked the same "general interests" as the Class, or that "specific features of the settlement sacrificed" the Class's interests to the interests of Class Counsel's other clients. In re Corrugated Container, supra, 643 F.2d at 208; see Findings of Fact at ¶¶ 315-317, 327-31. Accordingly, the Ortiz and Maritime Intervenors have not "point[ed] to a trade-off of their rights and actual prejudice," and have therefore failed to rebut the presumption that counsel who negotiated a fair settlement represented the class adequately. In re Chicken Antitrust, supra, 669 F.2d at 237; see

In re Corrugated Container, supra, 669 F.2d at 212; In re Agent Orange, supra, 800 F.2d at 19-20.

62. Moreover, as a result of the Court's appointment of a guardian ad litem and the extensive review the guardian conducted, the fairness determination is all the more dispositive of the adequacy-of-counsel issue.

63. The court hereby concludes that counsel adequately represented the class.

64. The Ortiz Intervenors' contend that Class Counsel was under a conflict of interest during the negotiations, and that, therefore, the Global Settlement should not be approved.[4]

65. Conflicts and other ethical issues before this Court are governed by "the ethical rules announced by the national profession in light of the public interest and the litigants' rights." In re American Airlines, Inc., 972 F.2d 605, 610 (5th Cir. 1992). The ethical rules have been developed and intended for use in the "traditional" lawyer-client context and "should not be mechanically applied to the problems that arise in the settlement of class action litigation," lest their categorical application "have a serious adverse effect on class actions." In re Agent Orange Product Liability Litigation, 800 F.2d 14, 19

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[4] Two expert witnesses have testified in this proceeding as to whether Class Counsel were under a conflict. Professor Hazard testified that they were not. Professor Leubsdorf testified to the contrary. Because the issue is a mixed question of fact and law for the Court to decide, this Court may be guided by the expert testimony, but is not bound by it. See, e.g., In re Solerwitz, 848 F.2d 1573, 1578 (Fed. Cir. 1988); Georgine, supra, 157 F.R.D. at 327.

(2d Cir. 1986); see In re Corn Derivatives Antitrust Litigation, 748 F.2d 157, 163 (3d Cir. 1984) (Adams, J., concurring), cert. denied, 472 U.S. 1008 (1985); Georgine, supra, 157 F.R.D. at 326; 3 Newberg on Class Actions, § 15.01 at 15-3.

66. Rule 1.7(b) of the ABA Model Rules of Professional Conduct, governing conflicts of interest, provides, in pertinent part, that:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another clientor to a third person, or by the lawyer's own interests, unless:
>
> (1) The lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) The client consents after consultation . . . .

67. Under these authorities and for the reasons set forth in Findings of Fact at ¶¶ 300-76, the court concludes that class counsel acted ethically at all times during the negotiations. See Holden v. Burlington Northern, Inc., 665 F. Supp. 1398, 1426-27 (D. Minn. 1987).

68. The Court therefore concludes that Class Counsel professionally, adequately and ethically represented the Class.

V. ADEQUACY OF NOTICE

69. Rule 23(e) requires that the Class be given notice of the proposed settlement. That notice is required to be given "in such manner as the Court directs," and the Court has considerable discretion in determining what notice is appropriate. See, e.g., Fowler v. Birmingham News Co., 608 F.2d 1055, 1059 (5th Cir. 1979); Battle v. Liberty Nat. Life Ins. Co., 770 F. Supp. 1499, 1521 (N.D. Ala. 1991), aff'd, 974 F.2d 1279 (1992), cert. denied, 113 S. Ct. 2999 (1993).

70. The largest notice campaign in history was conducted, likely notifying over a hundred million persons. Findings of Fact at ¶¶ 418-36, 441-42. The requirements of Rule 23(e) and the Due Process Clause have been wholly satisfied.

71. The Court rejects the Ortiz Intervenors' contention that presently uninjured future claimants can never be adequately notified under any circumstances. Every court to have considered this argument has rejected it, as does this Court for the reasons set forth by those authorities. See, e.g., Carlough v. Amchem, supra, Civ. No. 93-0215, at 39-42 (Oct. 27, 1993); In re "Agent Orange" Product Liability Litigation, supra, 100 F.R.D. at 728-29; In re Johns-Manville Corp., 78 B.R. 407, 408-09 (S.D.N.Y. 1987), aff'd, 843 F.2d 636 (2d Cir. 1988); In re A.H. Robins, supra, 880 F.2d at 717, 752; see also In re Silicone Gel Breast Implant Products Liability Litigation (MDL 926), Master File CV 92-P-1000-8 (N.D. Ala. Sept. 10, 1993).

VI. THE LHWCA SETTLEMENT

72. The Court concludes that the LHWCA class satisfies the requirements of Rule 23(a), and the action itself, which seeks declaratory and injunctive relief, satisfies Rule 23(b)(2). Conclusions of Law at ¶ 12; Findings of Fact at ¶¶ 275, 278, 292, 299. In assessing the fairness, adequacy and reasonableness of the LHWCA settlement, the Court applies the six-factor test described above. Conclusions of Law at ¶ 56. Upon reviewing the record, the Court concludes that (a) the LHWCA settlement is not the product of fraud or collusion; (b) the legal issues in the LHWCA context are sufficiently complex, and would be expensive to brief and argue; (c) there was adequate discovery; (d) the LHWCA class had little likelihood of successfully opposing an application for declaratory and injunctive relief against them; and (e) knowledgeable opinion supports the settlement. Findings of Fact at ¶¶ 398-417.

73. Applying the same legal standards to the LHWCA notice as set forth above, the Court finds that the LHWCA notice and its dissemination (Findings of Fact at ¶¶ 441-46) were fully satisfactory.

VII. THE THIRD-PARTY SETTLEMENT

A. Class certification

74. For the reasons given in the succeeding paragraphs, the Third-Party Claimant Class meets the prerequisites of Rule 23(a) and should be certified as a mandatory defendant class under Rules 23(b)(1)(A), 23(b)(1)(B) and 23(b)(2).

75. The numerosity requirement is satisfied; Findings of Fact at ¶ 278; conclusions of Law at ¶ 14.

76. As to commonality, all third-party class members have a common interest in (1) eliminating the risk posed by the coverage litigation and facilitating a resolution that provides substantial funds to pay Fibreboard's liability share and (2) avoiding joint-and-several liability for Fibreboard's share by securing a fair process for obtaining set-offs, credits and/or subrogation rights. Major issues presented against the class are therefore common to all of its members, including: (1) whether substantial insurance proceeds will be available to provide compensation to plaintiffs reflecting Fibreboard's liability share; (2) whether a bar order against third-party claims would be appropriate in order to implement a settlement among plaintiffs, Fibreboard and the Insurers; and (3) whether it is appropriate to cut off class members' rights to litigate third-party claims against Fibreboard and/or the Insurers and to some degree curtail their contribution and indemnification rights in order to facilitate a resolution of the coverage dispute and establishment of a process for obtaining set-offs, credits and contribution rights.

77. Typicality is likewise established. The defenses of the third-party class representative, Owens Illinois, arise from the identical events, practices and course of conduct as those of the remainder of the class. Class members are all governed by the same settlement, and their defenses to the Insurers' and Fibreboard's counterclaims seeking declarations regarding the fairness of that settlement and injunctions implementing it are thus of similar origin.

78. Finally, Owens-Illinois has adequately represented the third-party class. Owens-Illinois has been sued in thousands of asbestos-related personal injury suits throughout the country. Its relevant interests in ensuring that the maximum amount of money is available from either Fibreboard or the insurers to pay Fibreboard's liability share, in the treatment of whatever rights it may have to contribution or indemnification, and in preserving its rights of set-off, credits or subrogation against the Trust, are the same as those of all other members of the class. The Court also concludes that Owens-Illinois' counsel were well-qualified to represent the Class. Findings of Fact at ¶¶ 289-91, 298.

79. Any variations in interest among third-party class members are minor, are dwarfed by the overarching common interests all class members share, and do not render OwensIllinois' interests "antagonistic" for representation purposes. See, e.g., In re Corrugated Container, supra, 643 F.2d at 208; Georgine, supra; Jenkins, supra, 109 F.R.D. at 274.

80. Objectors Celotex and Carey Canada have provided no support for their claim that Owens-Illinois does not adequately represent their interests because they are in bankruptcy reorganization, and there is no basis for their position. Their argument is rejected.

81. Certification of the third-party class under Rule 23(b)(1)(A) will avoid the risk that multiple courts would render inconsistent or varying adjudications with respect to the Insurers' and Fibreboard's counterclaims seeking declarations as to the fairness of the third-party settlement and injunctions against all third-party class members. Differing adjudications as

to those matters would subject the Insurers and Fibreboard to incompatible standards of conduct. See Fed. R. Civ. P. 23(b)(1)(A).

82. Certification under Rule 23(b)(1)(B) is likewise appropriate. If Fibreboard and the Insurers were required to prosecute their counterclaims separately as against individual third-party class members, there would be a risk that adjudications would result disapproving the settlement and permitting separate actions by third-party class members against Fibreboard and/or the Insurers. For the reasons given above, permitting any such separate actions by third-party class members would risk substantially impairing the interests of the remainder of the third-party class by depleting the limited assets available to pay Fibreboard's liability share and by destroying the Global Settlement fund. Conclusions of Law at ¶ 32.

83. Finally, Fibreboard and the insurers, in settling disputes with the plaintiff and third-party classes, have acted on grounds generally applicable to the third-party class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to that class as a whole. Certification under Rule 23(b)(2) is thus appropriate as well.

B. Fairness of the settlement

84. The Court recognizes that the interests of the third-party class is in large part aligned with those of the Health-Claimant class. Each desires that the maximum amount of money be paid to claimants by Fibreboard and the Insurers in satisfaction of Fibreboard's liability share, thus eliminating risk

that third-party class members would have to absorb Fibreboard's share under joint-and-several liability.

85. In assessing the fairness, adequacy and reasonableness of the third-party settlement, the Court applies the six-factor test described above. Conclusions of Law at ¶ 56. Upon review of the record, the Court is satisfied (a) that the third-party settlement was not the product of fraud or collusion (Findings of Fact at ¶ 216); (b) that third-party asbestos litigation is extremely complex and expensive (Findings of Fact at ¶ 212); and (c) that sufficient discovery has been taken in the asbestos litigation to permit intelligent evaluation of the third-party settlement (Conclusions of Law at ¶ 56).

86. With respect to the fourth and fifth factors, all alternatives to the settlement are less favorable to the Class. The third-party settlement is greatly preferable from the class's standpoint to a continuation of the coverage litigation. Moreover, the possibility that the plaintiffs, the Insurers and Fibreboard would agree to a global settlement without also concluding a settlement of third-party claims is likewise a disadvantageous one. In the absence of the third-party settlement, Insurers and Fibreboard could well have been entitled to a bar order against third-party claims, leaving the third-party class without many of the benefits of the settlement. E.g., In re Silicone Gel Breast Implant Products Liability Litigation, 1994 WL 578353, at *18; see also South Carolina National Bank v. Sonte, 139 F.R.D. 335, 344 (D.S.C. 1991) (citing cases). Finally, given that the Trilateral Agreement likely would afford less money to claimants as a whole and the significant risk that it would afford no money to many claimants, it is likewise less advantageous to the third-party class.

87. Knowledgeable opinion favors the third-party settlement. Only a handful of objections have been received; The Court has considered them, and finds them to be without merit.

88. The Court accordingly concludes that the third-party settlement is fair, adequate and reasonable.

C. Notice

89. The notice given the third-party class was adequate and complies with due process.

Signed this 27th day of July, 1995.

Circuit Judge Robert M. Parker
Circuit Court Judge
United States Court of Appeals
Fifth Circuit
Sitting by Designation

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

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GERALD AHEARN, JAMES DENNIS, :
CHARLES W. JEEP, JAMES ELLISON :
and WILLIAM JAMES MITCHELL, on :
Behalf of Themselves and Others Similarly :
Situated, : Civil Action
Plaintiffs : No.
v. : 6:93cv526
FIBREBOARD CORPORATION and :
BETHLEHEM STEEL CORPORATION :
Defendants, :
:
CONTINENTAL CASUALTY COMPANY, :
CNA CASUALTY COMPANY OF :
CALIFORNIA, COLUMBIA CASUALTY :
COMPANY and PACIFIC INDEMNITY :
COMPANY, Defendant-Intervenors. :
:
OWENS-ILLINOIS, INC., on Behalf
of Itself and Others Similarly Situated, :
Additional Counterclaim :
Defendant. :
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SUPPLEMENTAL CONCLUSIONS OF LAW

July 27, 1995

Based in part on the findings of fact entered in this case, the Court makes the following supplemental conclusions of law.[1]

I. CERTIFICATION OF THE GLOBAL HEALTH CLAIMANT CLASS AS A COUNTERCLAIM DEFENDANT CLASS

1. The requirements for certification of a defendant class are the same as the requirements for certification of a plaintiff class: Each of the requirements of Rule 23(a) and at least of the requirements of Rule 23(b) must be satisfied.

A. The requirements of Rule 23(a)

2. The Global Health Claimant Class (GHCC) is the same size whether it is a plaintiff or a defendant class. It satisfies the numerosity requirement as to the counterclaims for the same reasons that it satisfies the requirement as a plaintiff class. See Conclusions of Law at ¶ 15.

3. The GHCC members have an overriding common interest in eliminating the risk that they

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[1] To the extent the following supplemental conclusions of law include findings of fact or mixed findings of fact and conclusions of law, those findings are hereby adopted by this Court.

face posed by the insurance coverage litigation. Findings of Fact at ¶¶ 4, 34, 54, 57, 225, 278, 346. The commonality requirement is, accordingly, satisfied.

4. In a defendant class action, typicality is shown if "the same event, practice, or course of conduct has given rise to the defense of the class members and their named representatives." In re Rusty Jones, Inc., 128 B.R. 1001, 1013 (N.D. Ill. 1991). The GHCC's representatives' defenses to the Insurers' and Fibreboard's counterclaims arise from the "same event[s], practice[s] and course[s] of conduct" as do those of the remainder of the Class. Findings of Fact at ¶ 288. The typicality requirement is satisfied.

5. The same class representatives and class counsel who represent the GHCC in connection with their claims against Fibreboard represent the GHCC as a defendant class against the counterclaims of the Insurers and Fibreboard. The adequacy of representation requirement is satisfied for the reasons set forth in the Conclusions of Law at ¶ 19-24.

B. The requirements of Rule 23(b)

6. Rule 23(b)(1)(A) provides for mandatory class certification where the prerequisites of Rule 23(a) are met and:

> (1) the prosecution of separate actions by or against individual members of the Class would create a risk of

> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class . . . .

7. Prosecution of the counterclaims against individual members of the Class would create a "risk" of "inconsistent or varying adjudications" that would "establish incompatible standards of conduct" for the insurers and Fibreboard. Differing adjudications as to the validity and enforceability of the global settlement would impair the insurers' and Fibreboard's ability to pursue a uniform course of conduct with respect to Class members, and would subject them to conflicting instructions as to whether to order the escrow to turn over the settlement monies to the Trust and whether to consider and respond to future claims filed directly against them. *See* *Robertson* v. *National Basketball Ass'n*, 389 F. Supp. 867, 901 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977). Accordingly, the requirements of Rule 23(b)(1)(A) are satisfied.

8. The requirements of certification pursuant to Rule 23(b)(1)(B) are set forth in the Conclusions of law at ¶¶ 21-40.

9. The Insurers' and Fibreboard's counterclaims seek declarations approving the Global Settlement and enjoining separate actions by Class members. If those counterclaims were prosecuted separately as against individual Class members, there would be a risk that one or more adjudications would result disapproving the settlement

and permitting separate actions by Class members against Fibreboard and/or the insurers. Permitting any such separate actions by Class members would create a risk of substantial impairment within the meaning of Rule 23(b)(1)(B) to the remainder of the Class. Conclusions of Law at ¶ 35. Certification of the Class as a defendant class under Rule 23(b)(1)(B) is thus appropriate.

10. Rule 23(b)(2) provides for mandatory class certification where the Rule 23(a) prerequisites are met and "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making ap-propriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . ." Many courts have certified defendant classes under Rule 23(b)(2). See, e.g., Marcera v. Chinlund, 595 F.2d 1231, 1238-39 (2d Cir.), judgment vacated on other grds, 442 U.S. 915 (1979), on remand, Marcera v. Chinlund, 91 F.R.D. 579 (W.D.N.Y. 1981) (certifying defendant class in 23(b)(2) action); Blake v. Arnett, 663 F.2d 906, 911-13 (9th Cir. 1981); Houston Chapter of the Int'l Ass'n of Black Professional Firefighters v. Houston, 1991 WL 340296, at *3, *28 (S.D. Tex. May 3, 1991); Thornton v. Butler, 728 F. Supp. 679, 681 & n.6 (M.D. Ala. 1990); United States v. Rainbow Family, 695 F. Supp. 314, 319-21 (E.D. Tex. 1988); Baker v. Wade, 553 F. Supp. 1121, 1125 n.1 (N.D. Tex. 1982), rev'd on other grounds, 769 F.2d 289 (5th Cir. 1984) (en banc), cert. denied, 478 U.S. 1022 (1986); Doss v. Long, 93 F.R.D. 112, 115, 119 (N.D. Ga. 1981).

11. The Insurers and Fibreboard have "acted . . . on grounds generally applicable to the class" by entering into proposed settlements that affect the rights of all members of the Class. "[F]inal injunctive relief [and] corresponding declaratory relief with respect to the class as a whole," in the form of a declaration that the settlement is fair, reasonable and adequate and injunctions regulating the resolution of future claims, is appropriate.

12. The Court therefore concludes that the GHCC should be certified for settlement purposes as a defendant class under Rules 23(b)(1)(A), 23(b)(1)(B) and 23(b)(2) with respect to Fibreboard's and the Insurers' counterclaims.

II. INTERPLEADER JURISDICTION

13. Title 28 U.S.C. § 1335, creates three requirements for certification of interpleader actions: (1) the action must be brought by a party with over $500 at stake; (2) there must be two or more adverse claimants to the money or property; and (3) the impleaded money or property, or a bond in the same amount, must be deposited with the Court. See 28 U.S.C. § 1335. The statute is "liberally construed" to effectuate its purpose, the protection of a stakeholder "from the possibility of multiple claims upon a single fund." In the Matter of Bohart, 743 F.2d 313, 324 (5th Cir. 1984); see also State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 533 (1967) (same); Maryland Casualty Co. v. Glassell-Taylor & Rob-inson, 156 F.2d 519 (5th Cir. 1946); Lummis v. White, 629 F.2d 397, 399-400 & n.6 (5th Cir. 1980), rev'd on other grounds sub nom. Cory v. White, 457 U.S. 85 (1982).

14. Each of section 1335's requirements is satisfied here. Findings of Fact at ¶¶ 204, 278.

15. The Court rejects the Ortiz Intervenors contention that there can be no interpleader jurisdiction because "there is no true limited fund which could support interpleader certification." The Global Settlement created the fund that must be equitably distributed among class members (Conclusions of Law ¶ 38), and the invocation of interpleader is therefore permissible. Interpleaders have been used to effectuate mandatory class-action settlements. See, e.g., Bush v. Rewald, (1986-87 Transfer Binder) Fed. Sec. L. Rep. (CCH) ¶ 92,999 (D. Haw. Sept. 4, 1986); Grantham v. J.L. Mason Group, 811 F. Supp. 1386 (E.D. Mo. 1993).

16. Statutory interpleader also establishes personal jurisdiction over class members' claims against Fibreboard even though those claims were, prior to the settlement, in personam in character. Through the agreement of representative plaintiffs on behalf of all class members, the claims of plaintiffs are limited to the fund that has been established. Findings of Fact at ¶¶ 191-94, 260. Thus, the circumstance presented is that of a classic interpleader. See State Farm Fire & Casualty v. Tashire, 386 U.S. 523, 534 (1967).

Signed this 27th day of July, 1995

Circuit Judge Robert M. Parker
Circuit Court Judge
United States Court of Appeals
Fifth Circuit
Sitting by Designation

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

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GERALD AHEARN, JAMES DENNIS, :
CHARLES W. JEEP, JAMES ELLISON :
and WILLIAM JAMES MITCHELL, on :
Behalf of Themselves and Others Similarly :
Situated, : Civil Action
Plaintiffs : No.
v. : 6:93cv526
FIBREBOARD CORPORATION and :
BETHLEHEM STEEL CORPORATION :
Defendants, :
:
CONTINENTAL CASUALTY COMPANY, :
CNA CASUALTY COMPANY OF :
CALIFORNIA, COLUMBIA CASUALTY :
COMPANY and PACIFIC INDEMNITY :
COMPANY, Defendant-Intervenors. :
:
OWENS-ILLINOIS, INC., on Behalf
of Itself and Others Similarly Situated, :
Additional Counterclaim :
Defendant. :
-------------------------------- x

JUDGMENT APPROVING GLOBAL SETTLEMENT

A Global Settlement Agreement was entered into as of December 23, 1993 by and among plaintiffs Gerald Ahearn, James Dennis and Charles W. Jeep (collectively "Representative Plaintiffs"), on behalf of themselves and the provisionally certified plaintiff class in the above-captioned action (the "Settlement Class"), defendant Fibreboard Corporation and defendant-intervenors Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and Pacific Indemnity Company. The Global Settlement Agreement was amended by the parties on December 21, 1994, February 6, 1995 and May 15, 1995 (the Global Settlement Agreement, as amended, will henceforth be referred to as the "Global Settlement Agreement"). A Defendant Class Settlement Agreement was entered into as of December 22, 1993 by and among the Representative Plaintiffs, on behalf of themselves and the Settlement Class, Fibreboard Corporation, Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, Pacific Indemnity Company, and counterclaim defendant Owens-Illinois, Inc., on behalf of itself and the counterclaim defendant class subsequently provisionally certified in the above-captioned action (the "Global Third Party Claimant Class").

Following notice to the two affected classes, the Court held a hearing commencing on December 12, 1994 to consider whether the Global Settlement Agreement should be approved as fair, reasonable and adequate pursuant to Rule 23(e), Fed. R. Civ. P. Based on the evidence presented at the hearings, together with the papers and statements of counsel submitted by the parties in connection therewith, and the findings of fact and conclusions of law heretofore entered by the Court, the Court has determined that the Global Settlement Agreement is fair, reasonable and adequate and should be approved.

All capitalized terms not otherwise defined herein have the meanings set forth in the Glossary attached as Exhibit A hereto.

IT IS ORDERED, ADJUDGED AND DECREED, that:

I. The terms and provisions of the Global Settlement Agreement, including the releases and indemnities contained therein, are approved;

II. The Trust Agreement and the Trust Distribution Process incorporated in the Global Settlement Agreement are approved;

III. The parties shall implement the Global Settlement Agreement;

IV. The settlement reflected by the Global Settlement Agreement, with respect to both Class Member Claims and Third Party Claims, is fair, reasonable and adequate, and was entered into in good faith;

V. The Settlement Class Members and the Global Third Party Claimant Class Members have received adequate notice of the settlement contemplated by the Global Settlement Agreement, Rule 23 of the Federal Rules of Civil Procedure and the Constitution of the United States.

VI. The Settlement Class Members have been adequately, professionally and ethically represented by Class Counsel.

VII. All Class Member Claims, except for claims for punitive or exemplary damages, are directed to the Trust for disposition pursuant to the Trust Agreement and Trust Distribution Process;

VIII. As provided with specificity in the separate Judgment Approving Longshore Settlement, any settlement approved by the Court in this action is not and shall not be deemed to be a "settlement" or a "compromise" within the meaning of either Section 933(g)(1) or 933(g)(2) of the

Longshore and Harbor Workers' Compensation Act ("LHWCA") or Section 702.281 of Title 20 of the Code of Federal Regulations, nor is this Judgment Approving Global Settlement, the separate Judgment Approving Longshore Settlement and/or the separate Judgment Approving Agreement Regarding Plant Insulation Company a "judgment" under Section 933(g)(2) of the LHWCA with respect to any claim for which any member of the Settlement Class would otherwise be entitled to compensation under the LHWCA. Only individual settlements by, or awards on claims of, Settlement Class Members with or against the Trust shall trigger the notice, approval or forfeiture provisions of the LHWCA and other similar state and federal workers' compensation provisions.

IX. The Class Action, and all Class Member Claims (including all punitive and exemplary damage claims) against the Fibreboard, Continental and Pacific Releasees, are dismissed on the merits, without costs and with prejudice;

X. The provision contained in the Global Settlement Agreement whereby Fibreboard Corporation and the Insurers agree that the Insurers shall be discharged from any further obligation under or in connection with the Insurance Policies, except as an Insurer has specifically assumed under the Global Settlement Agreement or has preserved under the Settlement Agreement (and the related agreements referred to therein), is fair, reasonable and non-collusive;

XI. The Fibreboard, Continental and Pacific Releasees are discharged from any further liability with respect to any Class Member Claim or Third Party Claim;

XII. Fibreboard Corporation and its subsidiaries are permanently enjoined from asserting any and all claims of whatsoever description by Fibreboard Corporation and its subsidiaries, including bad faith claims, against (i) Continental

Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, their parents, subsidiaries, affiliates, directors, employees, officers, agents and attorneys or (ii) Pacific Indemnity Company, its parents, subsidiaries, affiliates, directors, employees, officers, agents and attorneys; except that this injunction shall not extend to any claims arising out of the Global Settlement Agreement, the Settlement Agreement among Fibreboard Corporation, Continental Casualty Corporation, CNA Casualty Company of California, Columbia Casualty Company and Pacific Indemnity Company dated October 12, 1993 (or the related agreements referred to therein) or any obligation of the Settlement Class, Fibreboard Corporation, Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, and Pacific Indemnity Company pursuant to an agreement or agreements entered into after December 23, 1993. Notwithstanding the foregoing exceptions, this injunction shall extend to any and all claims arising from paragraphs 1 and 2 of the April 9, 1993 agreement between Fibreboard Corporation and Continental Casualty Company, CNA Casualty Company of California and Columbia Casualty Company (the "April 9 Agreement").

XIII. All Settlement Class Members[1]* are permanently enjoined from asserting against (i) any Fibreboard Releasee,[2] (ii) Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, their parents, subsidiaries, affiliates, directors, employees, officers, agents and attorneys or (iii) Pacific Indemnity Company, its parents, subsidiaries, affiliates, directors, employees, officers, agents and attorneys any Personal Injury Asbestos Claim of such Settlement Class Member, which is defined as:

(a) each and every claim, demand, action or suit of any kind for personal injury arising, directly or indirectly, from exposure to asbestos-containing products (including, without limitation, any direct action claim, wrongful death claim, punitive or exemplary damages claim, loss of consortium claim, fear of disease claim, bad faith claim, or surviving personal injury claim), and whether such injury manifested itself heretofore or here after, or (b) any claim, demand, action or suit of any kind arising, directly or indirectly, from any such claim, demand, action or suit referred to in (a) above (including without limitation any bad faith claim, contribution claim, indemnity claim, warranty claim, direct action claim or Additional Policy Claim [3]) against Fibreboard, against the Insurance Policies or against the Insurers (as those terms are defined in the preceding footnote) in any way predicated on obligations created by the Insurance Policies; provided, however, that a Personal Injury Asbestos claim shall not include any claim for benefits brought by an employee or his or her personal representative under any federal or state workers compensation statute (including, but not limited to, the United States Longshore and Harbor Workers Compensation Act and the Federal Employees Compensation Act), but shall include any subrogation, contribution or indemnity claim arising from such claim for benefits.

XIV. All Global Third Party Claimant Class Members[4] are permanently enjoined from asserting any Third Party Claim[5] against (i) any Fibreboard Releasee (as defined above), (ii) Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, their parents, subsidiaries, affiliates, directors, employees, officers, agents and attorneys or (iii) Pacific Indemnity Company, its parents, subsidiaries, affiliates, directors, employees, officers, agents and attorneys.

XV. The provisions set forth in the Global Settlement Agreement and the Trust Distribution Process for the resolution of Third Party Claims are approved and the terms and conditions of the Defendant Class Settlement Agreement are approved;

XVI. As provided with specificity in the separate Judgment Approving Agreement Regarding Plant Insulation Company, the agreement by and among the parties regarding Plant Insulation Company is approved.

XVII. The Court retains exclusive jurisdiction (a) to enforce the provisions of this judgment; (b) to resolve any disputes as to the performance or interpretation of the Global Settlement Agreement or this judgment; (c) to adjudicate any attempt by any person to challenge this judgment in any respect; and (d) over the maintenance, administration and distribution of the Trust and the funds contained therein, subject to and in accordance with the provisions of the Trust Agreement and Trust Distribution Process incorporated therein.

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[1] Settlement Class Members are:

(a) All persons (or their legal representatives) who prior to August 27, 1993 were exposed, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), to asbestos or to asbestos-containing products for which Fibreboard may bear legal liability and who have not, before August 27, 1993, (i) filed a lawsuit for any asbestos related personal injury, or damage, or death arising from such exposure in any court against Fibreboard or persons or entities for whose actions or omissions Fibreboard bears legal liability; or (ii) settled a claim for any asbestos-related personal injury, or damage, or death arising from such exposure with Fibreboard or with persons or entities for whose actions or omissions Fibreboard bears legal liability;

(b) All persons (or their legal representatives) exposed to asbestos or to asbestos-containing products, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), who dismissed an action prior to August 27, 1993 without prejudice against Fibreboard, and who retain the right to sue Fibreboard upon development of a nonmalignant disease process or a malignancy; provided, however, that the Settlement Class does not include persons who filed and, for cash payment or some other negotiated value, dismissed claims against Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy; and

(c) All past, present and future spouses, parents, children and other relatives (or their legal representatives) of the class members described in paragraphs (a) and (b) above, except for any such person who has, before August 27, 1993, (i) filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) or (b) above in any court against Fibreboard (or against entities for whose actions or omissions Fibreboard bears legal liability), or (ii) settled a claim for the asbestos-related personal injury, or damage, or death of a class member described in (a) or (b) above with Fibreboard (or with entities for whose actions or omissions Fibreboard bears legal liability).

For purposes of this definition, a claim included within the terms of a settlement agreement (whether written, oral, or placed on a court record) prior to August 27, 1993 shall be deemed to have been settled before August 27, 1993 even if (i) an opt-out with respect to that claim has been or is exercised, or (ii) the settlement is subsequently repudiated by the Plaintiff; provided, however, that no claim which was included within the terms of a settlement agreement and which claim was not filed prior to August 27, 1993 shall be deemed settled unless it was eligible to be processed and liquidated prior to August 27, 1993.

[2] The "Fibreboard Releasees" mean the following entities, each of their respective predecessors, Subsidiaries, divisions, current and former attorneys, officers, directors and employees, and, with regard to Fibreboard Corporation's liability only, each of their respective successors in interest;

(a) Fibreboard Corporation; Fibreboard Paper Products Corporation; Fibreboard Products, Incorporated; Paraffine Companies, Incorporated; Plant Rubber & Asbestos Works; Pabco Products, Incorporated; and Pabco Insulation Corporation; and

(b) Louisiana Pacific Corporation (other than for asbestos-related claims against Louisiana-pacific which (a) state a basis for liability by Louisiana-Pacific wholly independent of any relationship between Louisiana-Pacific and Fibreboard Corporation or any act or omission in connection with such a relationship, and (b) as to which there is no basis for any claim against Fibreboard Corporation by the claimant or by Louisiana-Pacific.

3 "Additional Policy Claim" means each and every claim, de-mand, action or suit of any kind (i) which arises under, pursuant to or related to the Insurance Policies by any person or entity, whether directly or indirectly asserted against the Insurers or any third party, or arising under any term or terms or alleged coverage provided by the Insurance Policies and (ii) which arises directly or indirectly from personal injury resulting from exposure to asbestos or asbestos-containing materials for which Fibreboard may bear legal liability. For purposes of this definition: (a) "Insurance Policies" means policy number CLP 3197650 issued by Continental Casualty Company effective May 4, 1957, in favor of Fibreboard Corporation under its former name (Fibreboard Paper Products Corporation), policy number RD 951 90 81 issued by Continental Casualty Company, policy number RDU 975 65 87 issued by CNA Casualty Company of California and an endorsement thereto issued by Continental Casualty Company, policy number RDU 186 27 82 issued by Columbia Casualty Company, policy number RDU 186 30 62 issued by Columbia Casualty Company, policy number RDU 365 32 19 issued by Columbia Casualty Company, the policy that was alleged by Fibreboard Corporation to have been issued by Continental Casualty Company in the period 1954-56, and policy number LAC 88700 found to have been issued by Pacific Indemnity Company to Fibreboard Corporation effective May 4, 1956, and any other policies that were, or may be alleged to have been, issued to Fibreboard Corporation by any of the Insurers, including those set forth in the Pacific Indemnity Agreement; and (b) "Insurers" means (i) Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and all insurance or indemnity companies controlling, controlled by or under common control with any of them or (ii) Pacific Indemnity Company and all insurance or indemnity companies controlling, controlled by or under common control with it.

4 Global Third Party Claimant Class Members are:

All individuals, corporations, partnerships or associations, whether or not incorporated, and any federal or local government or agency thereof, or any other entity and his, her or its legal representative, that have a Third Party Claim (as defined below). The fifty states of the United States (and their governmental units and divisions entitled to immunity under the Eleventh Amendment to the United States Constitution), and governments of foreign nations (and units and divisions thereof) entitled to sovereign immunity are not Global Third Party Claimant Class Members.

5 Third Party Claims are any and all Personal Injury Asbestos Claims not held by Settlement Class Members (as those terms are defined above), except for the following:

(a) Settled Claims, which are defined as claims of individuals for asbestos-related personal injuries (i) that are not Personal Injury Asbestos Claims of Settlement Class Members and (ii) that as of August 27, 1993 had been settled (by Fibreboard Corporation or by Fibreboard Corporation and Continental) or were the subject of a verdict or judgment. For purposes of the definition of Settled Claims, a claim included within the terms of a settlement agreement (whether written, oral or placed on a court record) prior to August 27, 1993 shall be deemed to have been settled before August 27, 1993 even if (A) an opt-out right with respect to that claim has been or is exercised, or (B) the settlement is subsequently repudiated by the Plaintiff; provided, however, that no claim which was included within the terms of a settlement agreement and which was not filed prior to August 27, 1993 shall be deemed settled unless it was eligible to be processed and liquidated prior to August 27, 1993;

(b) Unsettled Claims, which are defined as claims of individuals for asbestos-related personal injuries brought against Fibreboard in lawsuits filed prior to August 27, 1993 and that are not Settled Claims. For purposes of this definition, "Unsettled Claims" shall include claims of persons who filed and for cash payment or some other negotiated value dismissed claims against Fibreboard and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy; or

(c) any claims arising directly or indirectly from any Settled Claims or Unsettled Claims.

Dated:

CIRCUIT JUDGE ROBERT M. PARKER
CIRCUIT COURT JUDGE
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
SITTING BY DESIGNATION

GLOSSARY

1. "Affiliate" of a Person means (i) a Subsidiary of such Person, (ii) a Person which owns, either alone or with or through one or more Affiliates, directly or indirectly, securities or other ownership interests having ordinary voting power to elect a majority of the board of directors or other persons performing similar functions of such Person, and (iii) a Subsidiary of any Affiliate of such Person.

2. "Class Action" means Ahearn, et al. v. Fibreboard Corp., et al., 6:93 cv 526 (E.D. Tex), filed by the Representative Plaintiffs in the Global Court on behalf of themselves and the Settlement Class against Fibreboard Corporation on September 9, 1993.

3. "Class Counsel" means Joseph F. Rice and Joseph B. Cox, Jr., of the firm of Ness, Motley, Loadholt, Richardson & Poole, P.C.; Harry F. Wartnick, of the firm of Wartnick, Chaber, Harowitz, Smith & Tigerman; and Steven Kazan, of the firm of Kazan, McClain, Edises & Simon; or successors of the foregoing individuals.

4. "Class Member Claim" means any Personal Injury Asbestos Claim of a Settlement Class Member.

5. "Continental Releasees" means Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, their parents, Subsidiaries, Affiliates, directors, employees, officers, agents and attorneys.

6. "Fibreboard" means Fibreboard Corporation; Fibreboard Paper Products Corporation; Fibreboard Products, Incorporated; Paraffine Companies, Incorporated; Plant Rubber & Asbestos Works; Pabco Products, Incorporated; and Pabco Insulation Corporation; and each of their respective predecessors, Subsidiaries and divisions, and with regard to Fibreboard Corporation's liability only, each of their respective successors in interest.

7. "Pacific Indemnity Agreement" collectively means the Agreement and a Rescission of Insurance Policies, both dated March 27, 1992, between Fibreboard Corporation and Pacific Indemnity Company, pursuant to which Pacific and Fibreboard agreed to settle their insurance coverage dispute.

8. "Pacific Releasees" means Pacific Indemnity Company, its parents, Subsidiaries, Affiliates, directors, employees, officers, agents and attorneys.

9. "Person" means any individual, corporation, partnership or association, whether or not incorporated, and any federal, state or local government or agency thereof, or any other entity and his, her or its legal representative.

10. "Settlement Agreement" means the agreement among Fibreboard Corporation, Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and Pacific Indemnity Company dated as of October 12, 1993 pursuant to which they agreed, among other things, to settle and compromise all claims and potential claims against the Insurers under the Insurance Policies.

11. "Subsidiary" means, with respect to any Person, any corporation or other entity in which that Person owns, directly or indirectly, securities or other ownership interest having ordinary voting power to elect a majority of the board of directors or other Persons performing similar functions.

12. "Trust" means the trust referred to in Article V of the Global Settlement Agreement.

13. "Trust Agreement" means the Fibreboard Asbestos Compensation Trust Agreement among Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company, Pacific Indemnity Company, Fibreboard Corporation and the Trustees attached as Exhibit B to the Global Settlement Agreement, as amended.

14. "Trust Distribution Process" means Annex A to the Trust Agreement, as amended.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

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GERALD AHEARN, JAMES DENNIS,                :
CHARLES W. JEEP, JAMES ELLISON              :
and WILLIAM JAMES MITCHELL, on              :
Behalf of Themselves and Others Similarly   :
Situated,                                   : Civil Action
Plaintiffs                          : No.
        v.                                  : 6:93cv526
FIBREBOARD CORPORATION and                  :
BETHLEHEM STEEL CORPORATION                 :
        Defendants,                         :
                                            :
CONTINENTAL CASUALTY COMPANY,:
CNA CASUALTY COMPANY OF                     :
CALIFORNIA, COLUMBIA CASUALTY               :
COMPANY and PACIFIC INDEMNITY               :
COMPANY, Defendant-Intervenors. :
                                            :
OWENS-ILLINOIS, INC., on Behalf
of Itself and Others Similarly Situated,    :
Additional Counterclaim                     :
Defendant.                                  :
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JUDGMENT REGARDING CLASS CERTIFICATION

All capitalized terms not otherwise defined herein have the meanings set forth in the Glossary attached as Exhibit A hereto.

IT IS ORDERED, ADJUDGED AND DECREED, that:

I. The following Settlement Class be certified, for settlement purposes only, as a mandatory, non-opt-out class under Rules 23(a) and 23(b)(1)(B) of the Federal Rules of Civil Procedure:

(a) All persons (or their legal representatives) who prior to August 27, 1993 were exposed, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), to asbestos or to asbestos-containing products for which Fibreboard may bear legal liability and who have not, before August 27, 1993, (i) filed a lawsuit for any asbestos related personal injury, or damage, or death arising from such exposure in any court against Fibreboard or persons or entities for whose actions or omissions Fibreboard bears legal liability; or (ii) settled a claim for any asbestos-related personal injury, or damage, or death arising from such exposure with Fibreboard or with persons or entities for whose actions or omissions Fibreboard bears legal liability;

(b) All persons (or their legal representatives) exposed to asbestos or to asbestos-containing products, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), who dismissed an action prior to August 27, 1993 without prejudice against Fibreboard, and who retain the right to sue Fibreboard upon development of a nonmalignant disease process or a malignancy; provided, however, that the Settlement Class does not include persons who filed and, for cash payment or some other negotiated value, dismissed claims against Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy; and

(c) All past, present and future spouses, parents, children and other relatives (or their legal representatives) of the class members described in paragraphs (a) and (b) above, except for any such person who has, before August 27, 1993, (i) filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) or (b) above in any court against Fibreboard (or against entities for whose actions or omissions Fibreboard bears legal liability), or (ii) settled a claim for the asbestos-related personal injury, or damage, or death of a class member described in (a) or (b) above with Fibreboard (or with entities for whose actions or omissions Fibreboard bears legal liability).

For purposes of this class definition, a claim included within the terms of a settlement agreement (whether written, oral, or placed on a court record) prior to August 27, 1993 shall be deemed to have been settled before August 27, 1993 even if (i) an opt-out with respect to that claim has been or is exercised, or (ii) the settlement is subsequently repudiated by the Plaintiff; provided, however, that no claim which was included within the terms of a settlement agreement and which claim was not filed prior to August 27, 1993 shall be deemed settled unless it was eligible to be processed and liquidated prior to August 27, 1993.

II. The following Global Third Party Claimant Class is certified, for settlement purposes only, as a mandatory, non-opt-out defendant class under Rules 23(a), 23(b)(1)(A), 23(b)(1)(B) and 23(b)(2) under the Federal Rules of Civil Procedure:

All individuals, corporations, partnerships or associations, whether or not incorporated, and any federal or local government or agency thereof, or any other entity and his, her or its legal representative ("Persons"), that have a Third Party Claim, which is defined as any Personal Injury Asbestos Claim that is not a Class Member Claim, except for Settled Claims, Unsettled Claims or any claims arising directly or indirectly from any such Settled Claims or Unsettled Claims; provided, however, that the fifty states of the United States (and their governmental units and divisions entitled to immunity under the Eleventh Amendment to the United States Constitution), and governments of foreign nations (and units and divisions thereof) entitled to sovereign immunity are not members of the Global Third Party Claimant Class.

Dated:

CIRCUIT JUDGE ROBERT M. PARKER
CIRCUIT COURT JUDGE
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
SITTING BY DESIGNATION

GLOSSARY

1. "Additional Policy Claim" means each and every claim, demand, action or suit of any kind (i) which arises under, pursuant to or related to the Insurance Policies by any person or entity, whether directly or indirectly asserted against the Insurers or any third party, or arising under any term or terms or alleged coverage provided by the Insurance Policies and (ii) which arises directly or indirectly from personal injury resulting from exposure to asbestos or asbestos-containing materials for which Fibreboard may bear legal liability.

2. "Class Member Claim" means any Personal Injury Asbestos Claim of a Settlement Class Member.

3. "Fibreboard" means Fibreboard Corporation; Fibreboard Paper Products Corporation; Fibreboard Products, Incorporated; Paraffine Companies, Incorporated; Plant Rubber & Asbestos Works; Pabco Products, Incorporated; and Pabco Insulation Corporation; and each of their respective predecessors, Subsidiaries and divisions, and with regard to Fibreboard Corporation's liability only, each of their respective successors in interest.

4. "Insurance Policies" means policy number CLP 3197650 issued by Continental Casualty Company effective May 4, 1957, in favor of Fibreboard Corporation under its former name, Fibreboard Paper Products Corporation, policy number RD 951 90 81 issued by Continental Casualty Company, policy number RDU 975 65 87 issued by CNA Casualty Company of California and an endorsement thereto issued by Continental Casualty Company, policy number RDU 186 27 82

issued by Columbia Casualty Company, policy number RDU 186 30 62 issued by Columbia Casualty Company, policy number RDU 365 32 19 issued by Columbia Casualty Company, the policy that was alleged by Fibreboard Corporation to have been issued by Continental Casualty Company in the period 1954-1956, and policy number LAC 88700 found to have been issued by Pacific Indemnity Company to Fibreboard Corporation effective May 4, 1956, and any other policies that were, or may be alleged to have been, issued to Fibreboard Corporation by any of the Insurers, including those set forth in the Pacific Indemnity Agreement.

5. "Insurers" means (i) Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and all insurance or indemnity companies controlling, controlled by or under common control with any of them and (ii) Pacific Indemnity Company and all insurance or indemnity companies controlling, controlled by or under common control with it.

6. "Personal Injury Asbestos Claim" means: (i) each and every claim, demand, action or suit of any kind for personal injury arising, directly or indirectly, from exposure to asbestos-containing products (including, without limitation, any direct action claim, wrongful death claim, punitive or exemplary damages claim, loss of consortium claim, fear of disease claim, bad faith claim, or surviving personal injury claim), and whether such injury manifested itself heretofore or hereafter, or (ii) any claim, demand, action or suit of any kind arising, directly or indirectly, from any such claim, demand, action or suit referred to in (i) above (including without limitation any bad faith claim, contribution claim, indemnity claim warranty claim, direct action claim or Additional Policy Claim) against Fibreboard, against the Insurance Policies or against the Insurers in any way predicated

on obligations created by the Insurance Policies; provided, however, that a Personal Injury Asbestos Claim shall not include any claim for benefits brought by an employee or his or her personal representative under any federal or state workers compensation statute (including, but not limited to, the United States Longshore and Harbor Workers' Compensation Act and the Federal Employee Compensation Act), but shall include any subrogation, contribution or indemnity claim arising from such claim for benefits.

7. "Settled Claims" mean claims of individuals for asbestos-related personal injuries (a) that are not Class Member Claims and (b) that as of August 27, 1993 had been settled (by Fibreboard Corporation or by Fibreboard Corporation and Continental) or were the subject of a verdict or judgment.

For the purpose of this definition, a claim included within the terms of a settlement agreement (whether written, oral or placed on a court record) prior to August 27, 1993 shall be deemed to have been settled before August 27, 1993 even if (i) an opt-out right with respect to that claim has been or is exercised, or (ii) the settlement is subsequently repudiated by the Plaintiff; provided, however, that no claim which was included within the terms of a settlement agreement and which was not filed prior to August 27, 1993 shall be deemed settled unless it was eligible to be processed and liquidated prior to August 27, 1993.

8. "Unsettled Claims" shall mean claims of individuals for asbestos-related personal injuries brought against Fibreboard in lawsuits filed prior to August 27, 1993 and that are not Settled Claims. For purposes of this definition, "Unsettled Claims" shall include claims of persons who filed and

for cash payment or some other negotiated value dismissed claims against Fibreboard and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

GERALD AHEARN, ET AL. §
§
V. § CIVIL ACTION
NO. 6:93cv526
§
FIBREBOARD CORPORATION, §
ET AL. §

JUDGMENT ON ATTORNEYS' FEES

In accordance with the Magistrate Judge's Reports and Recommendations and the Court's Orders of August 18, 1995 and August 29, 1995, the Court

Enters Judgment in favor of Joseph F. Rice and Joseph B. Cox, Jr. of the firm Ness Motley Loadholt and Richardson against Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and Pacific Indemnity Company in the amount off $16,461,391.20 for attorney fees and $ 456,806.57 for expenses.

Enters Judgment in favor of Steven Kazan of the firm Kazan McClaim Edises & Simon, against Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and Pacific Indemnity Company in the amount of $9,236,515.20 for attorneys fees and $217,729.84 for expenses.

Enters Judgment in favor of Harry F. Wartnick of the firm Wartnick, Chaber, Harowitz, Smith and Tigerman, against

Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and Pacific Indemnity Company in the amount of $6,855,302.40 for attorneys' fees and $296,658.07 for expenses.

Enters Judgment in favor of Elihu Inselbuch of the firm Caplin and Drysdale, against Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and Pacific Indemnity Company in the amount of $11,179,504.80 for attorney fees and $251,547.62 for expenses.

Enters Judgment in favor of R. Bruce Shaw of the firm Nelson Mullins Riley and Scarborough, L.L.P., counsel for class representative Owens-Illinois, against the settlement Trust in the amount of $108,563.23 for attorneys' fees and expenses.

Enters Judgment in favor of Richard Josephson and George Shipley of the firm Baker and Botts, counsel for class representative Owens-Illinois, against the settlement Trust in the amount of $186,022.00 for attorneys' fees and $16,818.00 for expenses.

Enters Judgment in favor of Clinton A. Krislov, of the firm Krislov and Associates and Ronald W. Lipton of the firm Stinson, Lupton and Weiss, P.A., counsel for the Longshore Intervenors against the settlement Trust in the amount of $474,954.40 for attorneys' fees and $25,257.56 for expenses.

This Judgment is contingent upon the settlement agreement in *Ahearn v. Fibreboard Corp.*, civil action number 6:93cv526 receiving final judicial approval, and upon any agreement between class counsel.

SIGNED this _____ day of August, 1995.

ROBERT M. PARKER
UNITED STATES CIRCUIT JUDGE
United States Court of Appeals
for the Fifth Circuit
Sitting by Designation

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Civil Action No. 6:96CV526

GERALD AHERN, JAMES DENNIS, and §
CHARLES W. JEEP, On Behalf of §
Themselves and Others §
Similarly Situated §
§
Plaintiffs, §
§
v. §
§
FIBREBOARD CORPORATION §
§
Defendant §
§
CONTINENTAL CASUALTY COMPANY §
and §
PACIFIC INDEMNITY COMPANY §
§
Intervenors §

ORDER PROVISIONALLY CERTIFYING CLASS FOR SETTLEMENT PURPOSES

On September 9th, 1993, plaintiffs and intervenors, Continental Casualty Company and Pacific Indemnity Company ("Intervenors"), submitted to this Court a joint motion for provisional certification, for settlement purposes only, that this action may be maintained as a class action, pursuant to Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure, on behalf of a class consisting of certain future claimants. Based on the class action complaint, the answer and counterclaims of Intervenors, the affidavits of Joseph B. Cox, Jr., Meyer G. Koplow, and Roger M. Trangsrud (and accompanying exhibits), the memorandum of law submitted therewith, and all prior proceedings in this Court, the Court finds that the requested provisional class certification is authorized by Rule 23 of the Federal Rules of Civil Procedure, that the provisional certification will facilitate proceedings in connection with a settlement heretofore agreed upon by the parties to this action and that certification of the proposed class pursuant to Rule 23(b)(1)(B) is appropriate.

IT IS THEREFORE ORDERED that this action is hereby provisionally certified, pursuant to Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure, for settlement purposes only, as a class action on behalf of a class consisting of:

(a) all persons (or their legal representatives) who have been exposed, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member, or any other person), to asbestos or to asbestos-containing products for which Fibreboard may bear legal liability and who have not, before August 27, 1993, filed a lawsuit or settled a claim for asbestos-related personal injury, or damage, or death in any court against Fibreboard or against persons or entities for whose actions or omissions Fibreboard bears legal liability;

(b) all persons (or their legal representatives) exposed to asbestos or to asbestos-containing products, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member, or any other person), who dismissed an action prior to August 27, 1993 without prejudice against Fibreboard, and who retain the right to sue Fibreboard upon development of a nonmalignant disease process or a malignancy; provided, however, that the Class does not include persons who filed and, for cash payment or some other negotiated value, dismissed claims against Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy; and

(c) all past, present and future spouses, parents, children, and other relatives (or their legal representatives) of the class members described in paragraphs (a) and (b) above, except for any such person who has, before August 27, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) or (b) above in any court against Fibreboard (or against entities for whose actions or omissions Fibreboard bears legal liability).

IT IS FURTHER ORDERED that plaintiffs Gerald Ahern, James Dennis, and Charles W. Jeep are designated as representatives of the class, and that Joseph F. Rice, Joseph B. Cox, Jr., Steven Kazan, Harry F. Wartnick and Robert E. Sweeney are designated as counsel for the class. The law firm of Caplin & Drysdale, Chartered is designated as counsel to the class counsel.

IT IS FURTHER ORDERED that any person wishing to be heard with respect to the provisional class certification ordered herein, or to the final certification of a class of any kind in this matter, will have an opportunity to do so before this Court at the hearing to be held upon the fairness of the settlement.

IT IS FURTHER ORDERED that this provisional certification shall be subject to further Order of the Court.

SIGNED this the 9th day of September, 1993.

ROBERT M. PARKER, CHIEF JUDGE

APPENDIX K

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-40635

In re:
ASBESTOS LITIGATION

JAMES FLANAGAN, et al.,

Appellants,

VERSUS

GERALD AHEARN, et al.,

Appellees.

Appeal from the United States District Court
for the Eastern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion July 26, 1996,
5 Cir., 90 F.3d 963)

(Order Filed Nov. 26, 1996)

Before REAVLEY, DAVIS and SMITH, Circuit Judges.*

PER CURIAM:

The court having been polled at the request of one of its members and a majority of the judges who are in regular active service not having voted in favor (FRAP 35 and Local Rule 35), the suggestions for rehearing en banc are DENIED.

---

*Judges King, Higginbotham, Barksdale, Benavides, and Parker are recused and did not participate in the consideration of the suggestions for rehearing en banc. Judge Dennis also did not participate.

JERRY E. SMITH, Circuit Judge, with whom GARWOOD, JOLLY, JONES, EMILIO M. GARZA, and DeMOSS, Circuit Judges, join, dissenting:

I respectfully dissent from the failure of the court to grant rehearing en banc. The result of this litigation, as implemented by the district court and affirmed by the panel majority, is the first no-opt-out, mass-tort, settlement-only, futures only class action ever attempted or approved. The issues presented are worthy of consideration beyond the level of circuit panel review.

Five of the active judges are disqualified from participating in this matter, and a sixth judge has elected not to participate in the consideration of the suggesting for rehearing en banc. Accordingly, it is not possible to determine whether, if all active judges were voting, a majority would decide to rehear this case en banc.

The applicable statute and rules require the affirmative vote of a majority of the active judges--here, nine of the seventeen active judges--for en banc consideration, as recused and non-participating judges are counted as members of the court for purposes of the calculation.[1] The effect in this case is to require not a simple majority, but a supermajority of 82%--nine of the eleven participating judges--to favor reconsideration.

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[1] "Judges in regular active service who are disqualified for any reason or who cannot participate in the decision of an en banc case nevertheless shall be counted as judges in regular active service." 5th Cir. R. 35.6. Under 28 U.S.C. § 46(c), rehearing en banc is "ordered by a majority of the circuit judges of the circuit who are in regular active service." *See* Fed. R. App. P. 35(a); *Shenker v. Baltimore & Ohio R.R.*, 374 U.S. 1, 4-5 (1963); *Western P.R.R. v. Western P.R.R.*, 345 U.S. 247, 250 (1953); *Variable Annuity Life Ins. Co. v. Clark[e]*, 998 F.2d 1295 (5th Cir. 1993), *suggestion for rehearing en banc*

(continued...)

That onerous requirement has not been met. Accordingly, the appellants' only recourse, in order to obtain review of the difficult and novel issues presented, is to petition the Supreme Court for writ of certiorari.

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[1](...continued)
denied, 13 F.3d 833, 834 (5th Cir. 1994) (Smith, J. dissenting), ***rev'd sub nom.*** *NationsBank v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810 (1995).

APPENDIX L

No. 95-40635

In re:
ASBESTOS LITIGATION

JAMES FLANAGAN, et al.,
Appellants,

VERSUS

GERALD AHEARN, et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Texas

(Order Filed Dec. 3, 1996)

ON SUGGESTION FOR PANEL REHEARING

Before REAVLEY, DAVIS and SMITH, Circuit Judges.*

PER CURIAM:

The application for panel rehearing is DENIED.

*Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

APPENDIX M

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE INVOLVED

U.S. CONST. ART. III, § 2:

> **The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.**

U.S. CONST. AMEND. V:

> **No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .**

RULES ENABLING ACT — **28 U.S.C. § 2072(b):**

> **Such rules shall not abridge, enlarge or modify any substantive right.**

RULES OF DECISION ACT — 28 U.S.C. § 1652:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

FED. R. CIV. P. 23:

> **(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> **(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> **(1)** the prosecution of separate actions by or against individual members of the class would create a risk of . . .
>
> > **(B)** adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially

impair or impede their ability to protect their interests. . . .

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

GERALD AHERN,	§	
JAMES DENNIS, and	§	
CHARLES W. JEEP,	§	
On Behalf of	§	Civil Action No.
Themselves and Others	§	6:96CV526
Similarly Situated	§	
	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	
FIBREBOARD CORPORATION		
Defendant		

CLASS ACTION COMPLAINT

Plaintiffs Gerald Ahern, James Dennis, and Charles W. Jeep, on behalf of themselves and others similarly situated, as and for their class action complaint against Defendant Fibreboard Corporation ("Fibreboard"), allege upon knowledge as to themselves and otherwise upon information and belief as follows:

Jurisdiction

1. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1332. Plaintiffs allege an amount in controversy in excess of $50,000.00, exclusive of Interest and costs, for each of the individual members of the Class.

2. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(a)(2).

Parties

Plaintiffs

3. Plaintiff Gerald Ahern is a resident of South Carolina. Plaintiff Ahern worked on board U. S. Navy ships at the Charleston Air Force Base and at the Charleston Naval Shipyard, Charleston, South Carolina, from the 1940's through the late 1980's. In the course of his employment he was exposed to asbestos-containing products manufactured and/or supplied by Fibreboard and others. As a direct and proximate result of his exposure to asbestos or asbestos-containing products, plaintiff Ahern contracted asbestosis. Plaintiff Ahern has not previously filed a lawsuit or settled any claims against Fibreboard based upon his exposure to asbestos or asbestos-containing products.

4. Plaintiff James Dennis is a resident of South Carolina. Plaintiff Dennis worked as a pipefitter from 1974 to 1988. In the course of his employment, he was exposed to asbestos-containing products manufactured and/or supplied by Fibreboard and others. Plaintiff Dennis has not yet been diagnosed as having an asbestos-related condition. However, as a direct and proximate result of his exposure to asbestos or asbestos-containing products, he has an increased risk of developing a number of malignant and nonmalignant asbestos-related conditions. Plaintiff Dennis has not previously filed a

lawsuit or settled any claims against Fibreboard based upon his exposure to asbestos or asbestos-containing products.

5. Plaintiff Charles W. Jeep is a resident of Missouri. Plaintiff Jeep worked at the Puget Sound Naval Shipyard in the state of Washington from 1944 until 1946. In the course of his employment he was exposed to asbestos-containing products manufactured and/or supplied by Fibreboard and others. As a direct and proximate result of his exposure to asbestos or asbestos-containing products, plaintiff Jeep contracted mesothelioma. Plaintiff Jeep has not previously filed a lawsuit or settled any claims against Fibreboard based upon his exposure to asbestos or asbestos-containing products.

Defendant

6. Defendant Fibreboard is a corporation organized under the laws of Delaware, with its principal place of business in California. Fibreboard is qualified to do, and does, business in Texas.

7. Fibreboard has also done business under the following names: Fibreboard Paper Products Corporation; Fibreboard Products (Eastern Division), Incorporated; Paraffine Companies, Incorporated; Plant Rubber & Asbestos Works; Pabco Products, Incorporated; and Pabco Insulation Corporation. "Defendant" or "Fibreboard" includes each of the above listed entities and each of their respective predecessors and successors in interest, and their respective subsidiary companies and divisions.

Class Action Allegations

The Class

8. Plaintiffs bring this action as a class action pursuant to Fed. R. Civ. P. 23(b)(1)(B) on behalf of themselves and a class of persons similarly situated.

9. The Plaintiff class (the "Class") is defined as follows:

A. All persons (or their legal representatives) who have been exposed, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member, or any other person), to asbestos or asbestos-containing products for which Fibreboard may bear legal liability and who have not, before August 27, 1993, filed a lawsuit or settled a claim for asbestos-related personal injury, or damage, or death in any court against Fibreboard or against persons or entities for whose actions or omissions Fibreboard bears legal liability.

B. All persons (or their legal representatives) exposed to asbestos or to asbestos-containing products, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member, or any other person), who dismissed an action prior to August 27, 1993 without prejudice against Fibreboard, and who retain the right to sue Fibreboard upon development of a nonmalignant disease process or a malignancy; provided, however, that the Class does not include persons who filed and, for cash payment or some other negotiated value, dismissed claims against Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignance.

C. All past, present and future spouses, parents, children, and other relatives (or their legal representatives) of the class members described in paragraphs (a) and (b) above, except for any such person who has, before August 27, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) or (b) above in any court against Fibreboard (or against entities for whose actions or omissions Fibreboard bears legal liability).

Requirements of Rule 23(a)

10. Numerosity. The Class is sufficiently numerous that joinder of all members is impracticable. Class members likely number in excess of one hundred and fifty thousand.

11. Commonality. Questions of law and fact are common to the Class, including: "state of the art" defense; strict liability; negligence; successor liability; health hazards of asbestos; when Fibreboard became aware or should have become aware of any health risks associated with the use of asbestos products; the steps, if any, taken to lessen those risks; failure to warn; adequacy of warnings; continued availability of punitive damages; the availability of insurance coverage; the appropriate allocation of Fibreboard's assets; and others.

12. Typicality. Claims of the class representatives typify those of the Class generally. All Class members share an interest in reducing litigation costs, maximizing the funds available for recovery, and ensuring the availability of insurance proceeds. These interests predominate over any issues affecting individual Class members.

13. Adequacy of Representation. Named Plaintiffs will fairly and adequately protect the interests of Class members. The interests of the named Plaintiffs are coincident with, and not antagonistic to, those of other members of the Class. In addition, Plaintiffs are represented by experienced and able counsel specifically appointed by this Court to negotiate a settlement and who have previously litigated numerous personal injury cases involving asbestos exposure and the injuries which may arise from such exposure.

Requirements of Rule 23(b)(1)(B)

14. This action is properly maintained as a Class action under Rule 23(b)(1)(B). For the reasons set forth in Paragraphs 15 through 26, the prosecution of separate actions by individual Class Members would create a risk of adjudications with respect to certain individual Class members which would, as a practical matter, be dispositive of the interests of other Class members not parties to the adjudications or which would substantially impair or impede the other Class members' ability to protect their interests, as alleged hereafter.

15. In the past fifteen years, tens of thousands of individuals exposed to asbestos or asbestos-containing products have filed lawsuits in the state and federal courts against Fibreboard and other asbestos manufacturers alleging injury and wrongful death.

16. More than 45,000 asbestos-related injury and wrongful death cases are still pending against Fibreboard.

17. Absent a settlement of Plaintiffs' claims, it is expected that over one hundred and fifty thousand additional asbestos-related cases will be filed against Fibreboard and other parties in future years.

18. Fibreboard's assets are so limited in relation to the pending and potential claims against Fibreboard that Fibreboard cannot pay, absent insurance proceeds, all future asbestos-related claims. Recovery by earlier litigants will likely exhaust Fibreboard's available and projected assets, and would, as practical matter, substantially impair the ability of later claimants to obtain relief.

19. Fibreboard contends that Continental Casualty Company ("Continental") and Pacific Indemnity Company ("Pacific") must indemnify Fibreboard against its liability for asbestos-related injury claims, pursuant to insurance policies issued by those companies in the 1950's. Pacific provided coverage during 1956 and 1957, and Continental provided coverage from 1957 to 1959.

20. Fibreboard has vigorously litigated its right to indemnity. In In re Asbestos Insurance Coverage Cases, (Included Action: Fireman's Fund v. Fibreboard Corporation, et al.) (Judicial Council Coordination Proceeding No. 1072), Superior Court of the State of California, City and County of San Francisco, Judge Ira Brown rendered judgment in favor of Fibreboard, in one of the most sweeping asbestos insurance coverage rulings to date. Judge Brown ruled that Continental and Pacific must indemnify Fibreboard in full for all liability to any claimant first exposed to asbestos any time prior to or

during their respective policy periods, even if that claimant did not manifest any disease until years later. That judgment is currently on appeal in the California Court of Appeal.

21. Both Continental and Pacific continue to deny coverage under the policies.

22. Absent indemnification from Continental or Pacific, Fibreboard is likely to be rendered insolvent by pending asbestos litigations, and unable to compensate Class members for asbestos-related injuries.

23. Even if Fibreboard ultimately prevails on appeal and obtains indemnity for claimants first exposed to asbestos prior to 1959, Fibreboard still would face financial uncertainty because of liability to individuals first exposed to asbestos after 1959. Fbreboard has entered into an agreement with Pacific that could provide funds for these individuals, but availability of these funds under that agreement is subject to challenge by Continental. Moreover, judgments for punitive damages in many jurisdictions would not be covered by the Continental or Pacific policies.

24. Unless Fibreboard settles its coverage disputes in a manner that ensures indemnification for asbestos claimants against Fibreboard, there is a substantial risk that Fibreboard will be rendered insolvent and asbestos claimants against Fibreboard will be left with no relief whatsoever.

The Proposed Settlement

25. In light of Fibreboard's limited assets, the unresolved issue of insurance coverage, and the expense of duplicative and protracted litigation, there is substantial risk that

adjudications with respect to individual Class members' claims will, as a practical matter, be dispositive of the claims and interests of other similarly situated Class members, or will substantially impair or impede the ability of Class members with unadjudicated claims to protect their interests.

26. On August 27, 1993, Fibreboard, Continental, Pacific, and negotiating counsel appointed by this Court to represent a "futures class" reached an agreement in principle, a proposed settlement, whereby Continental and Pacific have agreed to provide funds in excess of $1.5 billion to create a trust to compensate future asbestos claimants. In addition, Fibreboard has agreed to make an additional contribution to fund later years of the settlement trust. Those funds will provide a fair mechanism for settlement of the Class members' claims.

LIABILITY ALLEGATIONS

COUNT I: Negligent Failure to Warn

27. Plaintiffs incorporate herein by reference their allegations in Paragraphs 1 through 26 above.

28. Fibreboard, during all the times relevant hereto, caused asbestos-containing products to be placed in the stream of commerce with the result that all Plaintiffs and their decedents, and those similarly situated, were exposed, occupationally, paraoccupationally or through the exposure of a spouse or household member to asbestos fibers and dust emitted by those products.

29. As the proximate result of exposure to and the inhalation of asbestos fibers and dust of asbestos-containing

products, Plaintiffs and their decedents, and those similarly situated, have suffered or have an increased risk of developing injuries, including cellular changes in their lungs and other organs; diminished ability of their bodies to resist asbestos-related conditions; contraction of asbestos-related conditions, including, but not limited to, pleural thickening, pleural plaques, asbestosis, respiratory and other cancers, and mesothelioma; and enhanced risk of contracting such conditions in the future; emotional distress arising out of asbestos-related conditions or the fear of future asbestos-related conditions, and the necessity to undergo medical surveillance in order to detect the onset of any future asbestos-related conditions. As a proximate result of these injuries, Plaintiffs, their decedents, and those similarly situated to them, or some of them, have suffered further losses and injuries, such as lost wages, past and future medical expenses, funeral and burial expenses, loss of support, loss of consortium, pain and suffering, emotional distress, loss of life's pleasures, and loss of society.

30. During all times relevant hereto, Fibreboard knew or should have known of the dangers that exposure to its asbestos-containing products could cause conditions such as pleural thickening, pleural plaques, asbestosis, respiratory and other cancers, and mesothelioma in all Plaintiffs and their decedents, and those similarly situated to them.

31. During all times relevant hereto, Fibreboard failed to take reasonable steps to provide all Plaintiffs, their decedents, and those similarly situated to them, (a) adequate warnings of the known or potential dangers from exposure to its asbestos or asbestos-containing products and (b) adequate instructions on how to safely use its asbestos or asbestos-containing products so as to reduce the risk of asbestos-related conditions. The failure by Fibreboard to provide such warnings

and instructions constitutes negligence and proximately caused the injuries or potential injuries to Plaintiffs, their decedents, and those similarly situated to them as described above.

32. The failure of Fibreboard to provide Plaintiffs and those similarly situated to them with both adequate warnings of the danger from exposure to its asbestos or asbestos-containing products and adequate instructions on how to use its asbestos or asbestos-containing products so as to reduce the danger was reckless, wanton, and willful and in conscious disregard of Plaintiffs' safety and health.

COUNT II: Strict Liability

33. Plaintiffs incorporate herein by reference their allegations in Paragraphs 1 through 32 above.

34. The asbestos-containing products manufactured, produced, marketed, or sold by Fibreboard were defective and unreasonably dangerous to human health (a) because they were sold without any warnings or adequate warnings as to their dangers and without adequate instructions on how to use the products to as to reduce those dangers, or (b) because Fibreboard failed to develop alternative products with safer designs even though such products were feasible. Those defects were the proximate cause of the injuries to Plaintiffs and those similarly situated to them, as described in Count I.

35. The manufacture, production, marketing, and sale by Fibreboard of asbestos-containing products was reckless, wanton and willful and in conscious disregard of the safety and health of Plaintiffs and those similarly situated to them.

COUNT III: Breach of Express and Implied Warranty

36. Plaintiffs incorporate herein by reference their allegation in Paragraphs 1 through 35, above.

37. Fibreboard has breached express, as well as implied, warranties of good and merchantable quality and fitness for intended use with respect to its asbestos-containing products.

38. The breach of those warranties has proximately caused injury to Plaintiffs and those similarly situated to them, as described in Count I.

COUNT IV: Concert of Action and Conspiracy

39. Plaintiffs incorporate herein by reference their allegations in Paragraphs 1 through 38 above.

40. During all relevant times herein, Fibreboard acted in concert and as part of a conspiracy with other parties to withhold adequate warnings of the known and potential dangers from exposure to asbestos or asbestos-containing products.

41. As a result of this concert of action and conspiracy, Plaintiffs have suffered or have an increased risk of suffering injuries.

COUNT V: All Other Viable Claims

42. Plaintiffs incorporate herein by reference their allegations in Paragraphs 1 through 41, above.

43. Plaintiffs allege and assert that each and every recognized claim or cause of action against Fibreboard arising

from or related to exposure of asbestos-containing products, and claim all relief, legal or equitable, available to them.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court grant plaintiffs and the other members of the class the following relief:

A. General and special compensatory damages determined to have been sustained by each of them respectively;
B. Punitive damages from Fibreboard in an amount to be determined;
C. The costs of this suit;
D. Appropriate declarations and orders; and
E. Other relief as may be deemed just and proper.

DATED: September 9, 1993

Respectfully submitted,

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Joseph B. Cox, Jr.

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APPENDIX O

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION
Civil Action No. 6:96CV526

GERALD AHERN, JAMES DENNIS, and	§
CHARLES W. JEEP, On Behalf of	§
Themselves and Others	§
Similarly Situated	§
	§
Plaintiffs,	§
	§
v.	§
	§
FIBREBOARD CORPORATION	§
	§
Defendant	§
	§
CONTINENTAL CASUALTY COMPANY	§
	§
and	§
	§
PACIFIC INDEMNITY COMPANY	§
	§
Applicants for Intervention	§

MOTION FOR LEAVE TO INTERVENE BY CONTINENTAL CASUALTY COMPANY AND PACIFIC INDEMNITY COMPANY

COME NOW Continental Casualty Company and Pacific Indemnity Company ("Intervenors") and move for leave to intervene in this action in order to assert the defenses and claims as set forth in their proposed pleading, a copy of which is attached to this motion, and, in support of the motion, would respectfully state as follows:

1. Intervenors are the parties identified in the Plaintiffs' Complaint who allegedly indemnify the Defendant, Fibreboard Corporation, for any liability for asbestos-related injuries, pursuant to insurance policies issued in the 1950's as construed in certain coverage litigation involving those policies entitled In re Asbestos Insurance Coverage Included Action: Fireman's Fund v. Fibreboard Corporation, etal.) (Judicial Council Coordination Proceeding No. 1072), Superior Court of State of California, City and County of San Francisco, J. Brown presiding). As such,

Intervenors have an interest relating to the property and/or transaction which is the subject matter of the above-entitled action.

2. The proposed pleading of the Intervenors asserts defenses and claims regarding Plaintiffs' Complaint which have not yet been presented by the defendant and their interest in the proceedings will not and cannot be adequately represented by the present parties.

3. Intervenors are so situated that the disposition of this action may as a practical matter impair or impede Intervenors' ability to protect their interests.

4. Intervenors have defenses and claims relating to the Plaintiffs' Complaint raising questions of law or fact which are common to the main action.

5. Intervenors assert that to allow such intervention will not result in undue delay to the original parties to the proceeding.

6. Attached to this motion is the Intervenors' pleading setting forth the defenses and claims for which intervention is sought.

WHEREFORE, Continental Casualty Company and Pacific Indemnity Company respectfully pray that they be granted leave by this Court to intervene in the above-referenced action and for such other and further relief as may be deemed just and proper.

Dated: September 9, 1993

Respectfully submitted,

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APPENDIX P

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Civil Action No. 6:96CV526

GERALD AHERN, JAMES DENNIS, and §
CHARLES W. JEEP, On Behalf of §
Themselves and Others §
Similarly Situated §
§
Plaintiffs, §
§
v. §
§
FIBREBOARD CORPORATION §
§
Defendant §
§
CONTINENTAL CASUALTY COMPANY §
and §
PACIFIC INDEMNITY COMPANY §
§
Applicants for Intervention §

JOINT MOTION FOR PROVISIONAL CLASS CERTIFICATION

Upon the accompanying class action complaint, the affidavits of Meyer G. Koplow, Roger M. Trangsrud and Joseph

B. Cox, Jr. (and the exhibits attached thereto), and the accompanying memorandum of law, and the grounds set forth therein, named class representatives Gerald Ahern, James Dennis, and Charles W. Jeep, and intervenors Continental Casualty Company and Pacific Indemnity Company, hereby jointly move for an order, pursuant to Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure, for provisional certification of a class, as defined in Paragraph 9 of the Complaint in the above-captioned action, for purposed of settlement only, and for such other and further relief as the Court may deem just and proper.

Dated: September 9, 1993

Respectfully submitted,

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APPENDIX Q

Excerpts from Testimony of
Fibreboard Counsel Stephen Snyder
Page 143, Line 14

MR.MILLER: Thank you, Your Honor.

Q. At the time Fibreboard entered into the Asbestos Claims Facility, could you explain how it viewed the need to control filings of new cases, et cetera, and how that was affected its thinking?

A. Fibreboard was settling policies to get into the facility, and it still had policies in -- in process in the coverage litigation. I believe that many defendants saw the Asbestos Claims Facility as a surrogate for Johns-Manville, a big powerful organization that they could belong to that would control something that seemed to be starting to get out of control. So what Fibreboard looked for mainly when it went into the facility, I believe, at that time was a chance to exercise some influence on dockets, to do something about the number of cases that were coming on the dockets where there didn't seem to be any disease, and to keep the defense costs and the values within reasonable limits. And it was -- it was going to be through the bargaining ability of the facility to settle cases on large numbers of defendants -- for large numbers of defendants that the facility hopefully would be able to exercise that control and keep the litigation within rein.

Q. At the time Fibreboard entered the facility, would you explain the corporate goal which was described by some in opening statements with respect to managing and resolving the asbestos litigation?

A. It had been Fibreboard's corporate goal for some time to manage and resolve its asbestos liabilities within its available insurance resources. That was a principle that was etched onto the forehead of every asbestos lawyer that worked for Fibreboard and had been for years. Fibreboard was spending, for a company of its size, and enormous resources out of its cash, because it had to pay lawyers to prosecute its coverage litigation, and the goal that it had in mind was this deliverance that it would get if it was successful.

APPENDIX R

Excerpts from Testimony of
CNA Counsel Meyer Koplow
Page 1557, Line 1

Q. I want to turn to another brief subject, Mr. Koplow, that has to do with the legal ethics area. You are aware that one of the objectors has presented testimony, at least in deposition, and will present testimony here with respect to legal ethics issues? Are you aware of that, sir?

A. Yes, I am.

Q. In addressing one area that was discussed with that expert, did there ever come a time that CNA on its own behalf or Continental and Pacific together determined that there was one cap amount of money available to be split between the presents and future claimants?

A. No, I don't think it would be fair to say that there was a time when the insurers concluded there was one capped amount of money.

Q. So there was no direct competition at any time between so-called present claimants or future claimants for individual dollars that were available from the insurers, is that correct?

MR. BARON: Your Honor, I object to that one. I don't believe he's laid a foundation for it.

THE COURT: Overruled.

A. With the caveat that there was obviously some overall cost to the insurers that they ultimately would conclude they weren't prepared to exceed, I did not view the present claimants and the future claimants as being in direct competition.

MR. INSELBUCH:

Q. Indeed, as you sit here today, you do not know what the sum total of the expenses for the insurers will be; isn't that correct?

A. Unhappily, that is correct.

Q. And neither does Mr. Bschorr, isn't that correct?

A. I'd be shocked if Mr. Bschorr had better information on this than we did.

Q. Are you of a view one way or the other whether the plaintiffs' class of future claimants would have been better served had they been represented by lawyers, competent, able, hard-working lawyers who had no other involvement in asbestos cases rather than lawyers who indeed had involvement, even current involvement, in asbestos cases?

A. While I have no empirical data to support my view, I am confident that had we been dealing with counsel that did not have both the experience and leverage that this counsel had, that we would have been able to negotiate a deal that would have been less expensive to the insurers.

Q. Finally, I think you forgot one of the assets that does come into the trust. Do you recall under the global settlement agreement, if and when it is approved, that Fibreboard also was to assign to the trust any claims for contribution it might have that result from any and all present claims?

A. I -- I had forgotten that. That is correct, that's one of the trust assets.

MR. INSELBUCH: That's all I have, Your Honor.

APPENDIX S

Excerpts from Testimony of
Class Counsel Harry Wartnick
Page 684, Line 21

Q. Now, Mr. Wartnick, do you know one way or the other whether a trilateral or bilateral agreement would have been reached but for the conclusion of global settlement talks?

A. I don't know that.

Q. Okay. You can't testify one way or the other on that one, can you?

A. No, sir.

Q. All right. Mr. Wartnick, you never intended to file a class action lawsuit in a case such as this without an agreement in place, did you?

A. I wouldn't. I certainly had no intention to file a contested or a litigated class action lawsuit against Fibreboard during this process, that is correct.

Q. Okay. In other words, but for an agreement with Fibreboard, you would not have participated in a class action litigation against them; is that right?

A. I had no intention to file a litigated class action against them throughout this process, that is correct.

Q. All right. Now, in the event, however likely, that the global is disapproved by either this court or by another court, do you contemplate that this case will be dismissed?

A. I believe that applications will be made to the court to dismiss this action by Fibreboard and others. Whether it's actually dismissed is up to the court.

Q. Will you contest those motions to dismiss?

THE COURT: What does that have to do with any decision this court has to make?

MR. BARON: Mr. Wartnick knows. Your Honor, it goes to Article III, Section 2 of the Constitution, the power of this court at all to prosecute this case, if indeed this is a case.

THE COURT: The court has some passing familiarity with Article III. I see no relevance whatsoever to that line of questioning. Go ahead.

APPENDIX T

TRUST DISTRIBUTION PROCESS

Annex A to the Trust Agreement

This Trust Distribution Process creates the procedures for submitting, processing and paying Class Member Claims and Third-Party Claims. Capitalized terms used in this Trust Distribution Process are defined herein or in the Glossary.

A. Overview

The primary goal of the Trust is fair and equitable treatment for all Beneficiaries consistent with Trust resources. This Trust Distribution Process furthers that goal by establishing procedures that are intended to process and evaluate Class Member Claims of Beneficiaries impartially, pay all Class Member Claims over time, and maintain reasonable reserves for any Class Member Claims in excess of projections. The Trustees shall implement and administer this Trust Distribution Process in accordance with their duties under the Trust Agreement.

The claims resolution process begins with a proof of claim. The Trust then makes a determination whether the claim meets the criteria for any of the five Scheduled Diseases: Mesothelioma, Lung Cancer, Other Cancer, Asbestos Lung Disease I ("ALD-1") and Asbestos lung Disease II ("ALD-2"). If the claim meets the criteria for a Scheduled Disease, it will be evaluated based on factors that have significance in the resolution of similar claims by settlement or trial, including but not limited to the factors set forth in Schedule A hereto. If the claim does not meet the criteria for one of the Scheduled Diseases, the Trust will evaluate whether it nonetheless asserts a compensable claim for an asbestos-related injury.

After evaluation, the Trust will make a good faith settlement offer or advise the Beneficiary of the reasons for rejecting the claim. The Beneficiary may either accept or reject the offer or negotiate further with the Trust. If the Beneficiary rejects the Trust's offer, he or she may submit supplemental information to the Trust and have his or her claim reevaluated by the Trust and/or negotiate further with the Trust. If negotiation with the Trust fails, the Beneficiary shall, if he or she wishes to pursue the claim, proceed to mediation and then to binding or nonbinding arbitration. Beneficiaries may bring an action against the Trust in the tort system only after they have participated in good faith in both mediation and nonbinding arbitration and have rejected the award in a nonbinding arbitration.

Beneficiaries must also appear at a mandatory settlement conference under the auspices of the Court before proceeding to the tort system. If a Beneficiary rejects settlement following the settlement conference, he or she may elect immediate binding arbitration or exit to the tort system. No punitive damages, pre-judgment or post-judgment interest, damages for risk of cancer, or compensatory damages beyond Fibreboard's own share will be allowable in the tort system. Judgments may be collected only as provided in this Trust Distribution Process.

Similar claims-handling procedures (described in Section H below) apply to certain Third-Party Claims including those of Defendant Class Members who succeed to Class Member Claims.

Class Member Claims and Third-Party Claims will be eligible for payment once they are Liquidated, whether by settlement, arbitration, or judgment. Judgments or claims settled after exit to the tort system will normally be paid out over a five-year period, while claims resolved without resort to the tort system will normally be paid over a three-year period. Total payments from the Trust in each year for Trust Expenses, Class Member Claims and Third-Party Claims are limited to the amounts set forth in Section E. While the Trust is expected to be able to pay all claims as Liquidated yearly, if amounts available are insufficient to make all payments due on Liquidated claims in any year, claims for Mesothelioma and Lung Cancer will be paid first, then Other Cancer and ALD-1 claims, then ALD-2 claims, and then Residual Claims, whether any such claims have been Liquidated by settlement, arbitration or judgment. Within each of those categories, claims will be paid in the order of the date on which a release is received by the Trust (for settled claims), an arbitration ruling is rendered (for claims resolved through arbitration) or a judgment becomes final (for claims resolved in the tort system). Class Member Claims and Third Party Claims which cannot be paid because the amount available for that year is insufficient to make all payments due on such claims will be deferred for payment (FIFO within their payment categories) until the following year.

B. The Claim Procedure

1. **Submitting a Claim.** Other than Interim Claims submitted pursuant to Article 7 of the Global Settlement Agreement, commencing on February 14, 1994, any Beneficiary may submit a claim to the Trust. To do so, the Beneficiary shall

provide to the Trust, on forms approved by the Trustees and the SCB, a proof of claim including at least the following information concerning the Exposed Person: name, address, social security number, date of birth, date of death (if applicable), marital status and number and age of dependents, spouse's name and social security number, occupation, smoking history, year of first exposure to any asbestos or asbestos-containing products, identification and source of identification of asbestos-containing products manufactured or supplied by Fibreboard to which the Exposed Person was exposed, the work sites where the Exposed Person was exposed to asbestos or to Fibreboard asbestos, the years of such exposures including specific descriptive comments concerning the duration and intensity of such exposure, the status of related workers compensation or civil litigation regarding asbestos exposure, and the Scheduled Disease, if any, for which the Beneficiary believes the claim qualifies or a statement of the disease or injury the Beneficiary asserts he or she has if he or she does not believe he or she qualifies for a Scheduled Disease. In addition, the Beneficiary shall provide the Trust with a Medical Report, a PFT Report and a B-reader Report, and, in Malignancy Claims, a pathology report (where available).

2. **Expedited Review Option.** The Trust may establish a process for expedited review of ALD-2 claims by persons desiring an accelerated settlement of their claim at a fixed amount ("Expedited Review Claims"). A Beneficiary seeking such expedited review shall submit an abbreviated proof of claim for expedited review by the Trust. The abbreviated proof of claim shall provide the following information concerning the Exposed Person: name, address, social security number, date of birth, date of death (if applicable), marital status, spouse's name and social security number, occupation, the Scheduled Disease for which the Beneficiary believes the

claim qualifies, the work sites where the Exposed Person was exposed to asbestos or to Fibreboard asbestos and such information requested by the Trust that adequately demonstrates exposure to asbestos or asbestos-containing products and to Fibreboard asbestos or asbestos-containing products. In addition, the Beneficiary shall supply the Trust with a Medical Report. The Trust will expeditiously review the abbreviated proof of claim and may, but is not required to, offer to settle such Expedited Review Claims for a single fixed cash payment of an amount and on a time schedule established from time to time by the Trust. If the Trust determines not to offer to settle an Expedited Review claim, the Beneficiary may submit a proof of claim as set forth in Section B.1.

The Trust may establish additional categories of Expedited Review Claims with differing fixed cash payments and differing information requirements. In addition, the Trust may eliminate or suspend the Expedited Review Claim option for one or more categories of Class Member Claims if it determines that such option is encouraging the filing of claims that would not otherwise be eligible for payment under these procedures or is using a disproportionate share of the Trust's assets.

3. **Ordering of Claims for Processing.** Claims shall be ordered for processing by the Trust in the manner described in this Section. As a general practice, the Trust shall review its claims files on a regular basis and notify all Beneficiaries whose claims are likely to be processed in the near future. A Beneficiary's position in the FIFO queue for processing will be determined by the date of receipt by the Trust of a properly completed proof of claim form, and among claims received the same day, by the date of diagnosis of the disease on which the claim is based. Where the Beneficiary has filed an

incomplete proof of claim, the Trust shall notify the Beneficiary of the need for additional information and shall not process the claim until the file is complete. A Beneficiary shall not receive a position in the FIFO processing queue until his or her proof of claim is properly completed.

4. **Initial Evaluation of Claims.** As a proof of claim is reached in the FIFO queue, the Trust shall evaluate it to determine whether the claim qualifies as one of the five Scheduled Diseases. A Beneficiary's right to assert a valid claim for an asbestos-related injury or disease is in no way prejudiced by failure of his or her asbestos-related injury or disease to qualify as one of the Scheduled Diseases. If a Scheduled Disease is determined to exist, the Trust shall evaluate the Beneficiary's claim using factors relevant to the resolution of asbestos claims for that Scheduled Disease by settlement or trial, including the factors set forth in Schedule A hereto. If the Trust concludes that the Beneficiary's injury or disease does not meet the criteria for a Scheduled Disease, it shall determine whether the Beneficiary nonetheless asserts a meritorious claim for an asbestos-related injury or disease and shall evaluate the claim using factors relevant to the resolution of similar claims by settlement or trial. If the Trust accepts for disposition a claim with respect to a disease which is not a Scheduled Disease, the Trust shall place it in a Schedule Category based on which Scheduled Disease it most closely resembles.

In addition to the medical evidence which Beneficiaries are required to submit with the initial proof of claim or submit as part of any supplemental information she has submitted to the Trust all medical reports relating to any alleged asbestos-related condition other than those subject to attorney work product privilege. If the Beneficiary submits supplemental information to the Trust, the Trust shall reevaluate the claim and either make a written good faith settlement offer or reject the claim. The Beneficiary shall then reject or accept any offer based on reevaluation using the procedures outlined above for rejection or acceptance of the Trust's initial offer. If the Beneficiary rejects such offer, he or she may elect to negotiate further with the Trust or shall proceed to mediation.

6. **Second (Malignant) Injury Claims.** The Trust shall offer to settle Non-Malignancy Claims on two alternative bases: 1) in exchange for a general release; or 2) in exchange for a limited release covering all asbestos-related personal injury claims other than subsequent Malignancy Claims. The Trust's settlement offer for a limited release shall be the amount of its offer for the general release minus the lesser of: 1) half of its settlement offer for the general release; and 2) $1,750. If a Beneficiary accepts the Trust's offer of a limited release, the Trust shall account for the monetary difference between its settlement offer for the general release and its settlement offer for the limited release in a separate account. A Second Injury Claim shall be ordered in the FIFO queue for processing based upon the date of receipt by the Trust of the Second Injury Claim, and shall be treated as a new claim under this Trust Distribution Process.

7. **Audit Procedures.** In all cases, the Trust may require that medical x-rays, tests, laboratory examinations and other medical evidence comply with recognized medical standards regarding equipment, testing methods, and procedures to assure that such evidence is reliable. The Trust may develop methods for auditing the reliability of all data submitted in support of claims, including product identification and medical evidence, and may require independent interpretation of CT scans, X-rays, pathology specimens or other physical evidence. If its audits show an unacceptable level of reliability for evidence

submitted from specific individuals or institutions, the Trust may refuse to accept evidence from them. In addition, the Trust may develop methods for auditing other types of evidence necessary to support a claim.

8. Exigent Health and Extreme Hardship Claims. Notwithstanding the FIFO order processing rules described in Sections B.2 through B.4, the Trust may process and Liquidate Extreme Hardship Claims and Exigent Health Claims at any time.

The Trust shall establish procedures to expedite its processing, evaluation and negotiation of Exigent Health Claims and Extreme Hardship Claims as well as the ADR procedures the Beneficiary asserting such a claim shall be required to follow under Section C. Such expedited procedures shall be designed to allow all Exigent Health Claims to be Liquidated within six months of presentation of a properly completed proof of claim to the Trust, and to ensure, to the maximum extent practicable, that in jurisdictions in which Beneficiaries can obtain accelerated trial dates for Exigent Health Claims, the Trust's negotiation process and the ADR procedures can be completed before a trial of an Exigent Health claimant's case against Defendant Class Members.

If the Trust determines, in its sole discretion, that a Beneficiary asserting an Extreme Hardship Claim needs greater financial assistance than would be afforded by the payout scheme set forth in Section F.3, the Trust may accelerate payment to the Beneficiary of part or all of the amount for which that claim has been Liquidated as the Trust deems appropriate. Payments with respect to Exigent Health Claims shall be made only in accordance with the payout scheme set forth in Section F.3.

9. **Withdrawal of Claims.** If the Beneficiary does not respond to the Trust's offer on initial evaluation or reevaluation within 30 days, the Trust's offer and the claim shall be deemed to be withdrawn without prejudice unless the Beneficiary has requested in writing one or more extensions of time, not to exceed six months in the aggregate, within which to respond to the offer. If the Beneficiary still has not responded to the Trust's offer at the end of the extension period, the Trust's offer and the claim shall then be deemed to be withdrawn without prejudice. A Beneficiary may also elect to withdraw a claim at any time without prejudice. A claim that is withdrawn or deemed to have been withdrawn may be resubmitted at any time, and shall be reordered in the FIFO queue for processing based on the date of receipt by the Trust of a properly completed proof of claim with respect to the refiled claim.

C. ADR Procedures.

1. **Mediation.** If the Beneficiary chooses not to submit supplemental information or rejects the Trust's offer based on its evaluation of such supplemental information and elects not to negotiate further with the Trust, the Beneficiary's claim shall be referred to mediation. The Trust shall establish and maintain a list of Qualified Mediators, compensated by the Trust. The Trust shall refer claims to Qualified Mediators from the list in rotation as soon as practicable after being notified by the claimant that he wishes to proceed to mediation.

Claims shall be handled by each mediator in the order received by him or her, to the extent practicable. Any party may be represented by legal counsel. The mediator shall confer with the parties and/or their legal representatives, individually and jointly. Such conference may be in person or by telephone, at the claimant's election. The Beneficiary and a representative of the Trust with settlement authority must personally participate in the conference unless, in the judgment of the mediator, the Beneficiary's physical aor psychological condition precludes such participation. Such conference shall be in the nature of a settlement conference. The mediator shall review the claim and the positions of the parties, the prior negotiations between the parties, the offer(s) and demand(s), such information as the parties may wish to submit as to a fair and equitable settlement, and all documents and medical reports relevant to the claim. At least five days prior to the mediation conference, Beneficiary and the Trust shall each submit to a mediator a concise, confidential statement outlining the Beneficiary's medical condition, exposure to Fibreboard's products and each party's position on settlement value. The mediator shall work with both sides toward reaching an acceptable, reasonable settlement. The mediator does not have the authority to impose a settlement on the parties.

2. **Arbitration.** If the Beneficiary is unable to settle his or her claim with the Trust within 30 days of the mediation conference, the Beneficiary shall, if he or she wishes to pursue the claim, proceed to arbitration of the claim. The arbitration shall be commenced by a written demand for arbitration by the Beneficiary served on the Trust within 45 days of the mediation conference. Such arbitration shall be binding or nonbinding at the election of the Beneficiary, which election must be made in the Beneficiary's written demand for arbitration. The Trust and the Beneficiary shall bear their own fees and costs, except that the Trust shall pay the administrative fees and costs of conducting the arbitration unless the arbitrator in his or her sole discretion assesses such administrative fees and costs against any Beneficiary for delaying or abusing the arbitration procedures.

The Trust shall maintain a list of Qualified Arbitrators. Arbitrations shall be conducted by a single Qualified Arbitrator. The Beneficiary and the Trust shall attempt to agree on a Qualified Arbitrator who will preferably, but not necessarily, be selected from the list maintained by the Trust. If the parties cannot agree on a Qualified Arbitrator, a Qualified Arbitrator shall be selected pursuant to procedures of an independent arbitration facility to be selected by the Trust or by such other procedures as may be adopted by the Trust. The parties shall provide the Qualified Arbitrator and each other with copies of all relevant materials concerning the claim and any supplementary information they wish the Qualified Arbitrator to consider not less than 30 days prior to the date of the arbitration hearing. The Qualified Arbitrator may require the parties to submit such additional information as he or she deems necessary. The Qualified Arbitrator shall conduct a hearing on the claim at which testimony may be offered, unless both parties agree to waive such hearing. In nonbinding arbitrations, the Beneficiary must attend the hearing in person, unless in the judgment of the Qualified Arbitrator his or her physical or psychological condition makes such attendance impossible. The Qualified Arbitrator shall issue an award promptly but in no event later than 120 days from the date on which he or she receives the last submission of information from either of the parties relevant to the claim, unless the parties agree to extend such time. The Award shall be based on the same factors used by the Trust in evaluating claims.

If the Beneficiary elected binding arbitration at the time of the demand, neither party shall have the right to appeal the award other than on grounds set forth in the Federal Arbitration Act. If the Beneficiary elected nonbinding arbitration at the time of the demand, the award shall become final and binding if the Beneficiary does not reject the award by so notifying the Trust in writing within 30 days after receipt of the award. If the Beneficiary does not reject the award as provided above, he or she shall be deemed to have accepted it. If the Beneficiary rejects the award, the award shall not be binding on either party and the Beneficiary may proceed to the tort system under the procedures set forth below.

3. **Location for ADR Procedures.** The Trust shall establish procedures to conduct mediations and arbitrations at scheduled intervals at such locations around the United States as the Trust determines will be convenient to the largest numbers of claimants and will not impose undue burden on the Trust.

D. Litigation.

A Beneficiary may not proceed to litigate his or her claim against the Trust in the tort system unless he or she has in good faith: (1) submitted a proof of claim and rejected the resulting settlement offer from the Trust; (2) participated in a mediation conference and failed to settle his or her claim; (3) participated in nonbinding arbitration and rejected the resulting arbitration award; and (4) participated in a mandatory settlement conference as described below. The following procedures shall govern any Beneficiary who elects to litigate in the tort system his or her claim against the Trust.

1. **Mandatory Settlement Conference.** Before any Beneficiary may proceed to the tort system, the Beneficiary must request the Court to conduct a mandatory settlement conference with respect to the claim. This mandatory settlement conference may be conducted by the Court, or by another judge or a neutral special master designated by the Court, or, if both the Beneficiary and the Trust agree, by a mutually selected,

neutral third party other than the Court (the "Settlement Conference Designee"). The settlement conference may be conducted by telephone unless the Court or the Settlement Conference Designee determines, on application by the Trust or the Beneficiary, that the conference should be conducted in person. If the Court or the Settlement Conference Designee so determines, the settlement conference must be attended in person by the Beneficiary, unless in the judgment of the Court or the Settlement Conference Designee his or her physical or psychological condition makes such attendance impossible, and by a representative of the Trust with settlement authority at such location as the Court or the Settlement Conference Designee shall determine. If no settlement is reached within 30 days of the mandatory settlement conference, the Beneficiary and the Trust shall submit to each other on that date a written settlement offer that will remain in effect for an additional 30 days. If neither party accepts the other party's settlement offer during this period, then the Beneficiary may, upon certification from the Court or the Settlement Conference Designee that the Beneficiary has completed the settlement conference process and otherwise has complied with the requirements of the preceding paragraph of this Section D, commence a lawsuit against the Trust in the tort system or elect binding arbitration.

2. Procedural Rules.

a. Any Beneficiary who elects binding arbitration following the mandatory settlement conference shall follow the procedures set forth in Section C.2 above. Payment of any resulting award shall, however, be governed by Section F of this Trust Distribution Process.

b. Any Beneficiary who elects to resolve a claim through the tort system may pursue the claim in any appropriate forum, subject to the procedures set forth herein. Payment of any resulting judgment shall, however, be governed by Section F of this Trust Distribution Process.

c. The Trust may assert any and all defenses available to it or which would have been available to any Trustor against which the claim could have been asserted absent Global Approval Judgment with respect to Beneficiaries who elect to resolve their claims through the tort system.

d. In no event shall a Beneficiary be permitted to seek or recover from the Trust in a lawsuit in the tort system any punitive or exemplary damages of any sort. Nor may any claimant seek or recover compensatory damages in excess of Fibreboard's actual share of responsibility or for the actual percentage risk of contracting cancer. Finally, no Beneficiary may seek or recover pre-judgment interest in a suit in the tort system. Any other damages available under the applicable law shall remain recoverable except as provided in Section D.2.e below.

e. In no event shall the Trust or any other Person be required to post a bond to stay collection of a judgment in the tort system. Judgments shall be paid by the Trust in the order set forth in Section F below, and no Beneficiary shall be permitted to take any steps to collect a judgment from the Trust except as set forth in this Trust Distribution Process. The Trust shall not be responsible to pay post-judgment interest; in lieu thereof, the procedures set forth in the last sentence of Section F.1 shall apply.

f. (i) The death of a Beneficiary after he or she has filed a proof of claim with the Trust shall not eliminate compensable elements of his or her claim accruing prior to the date of death, by, for example, eliminating any claim for damages for pain and suffering occurring prior to the date of death or by creating an offset to a lost earnings award for personal consumption occurring prior to the date of death, notwithstanding applicable state law to the contrary. (ii) However, such compensable elements may not be recovered after exit to the tort system unless the Beneficiary shows that he or she could have recovered such damages absent compliance with the requirements of the Trust Distribution Process.

g. At trial the defendant shall be the Trust and the Trust and Beneficiary shall jointly request that the Trust be introduced to the trier of fact (judge or jury as the case may be) in the following fashion or in another substantially similar fashion as the trial court may direct, in addition to any other evidence permitted by the Court about the Trust's identity, goals and operations:

> Members of the jury, this is an action for damages for [personal injury/wrongful death] brought by plaintiff[s] against [various defendants, including] the Fibreboard Asbestos Compensation Trust. The Fibreboard Asbestos Compensation Trust was created by Order of a United States District Court to provide fair and equitable treatment for persons with asbestos injury for which Fibreboard Corporation might bear legal liability. The Trust has a fixed amount of money with which to compensate all persons with an asbestos injury to whom Fibreboard is found to be legally liable. This sum of money must cover all victims, past and future. Under no circumstances may you award any sum designed or

> intended to punish or make an example of Fibreboard or the Trust. If you should find that Fibreboard or products manufactured by Fibreboard were a legal cause of injury to plaintiff[s], any payment of damages awarded with respect to Fibreboard's products will be made by the Trust, not by Fibreboard itself. The fact that a trust exists is in no way an indication that you should impose any liability on the Trust. No sum you might award will be paid by either Fibreboard or by insurance; any award will be paid only by the Trust.

h. Any Beneficiary who elects to resolve a claim through the tort system shall provide the Trust (without cost to the Trust) with copies of all pleadings, discovery materials, evaluations, and other similar nonprivileged documentation requested by the Trust in connection with its defense of the claim in the tort system, so that the Trust may efficiently and economically prepare for trial.

E. Funds for Payment of Claims.

As set forth in the Trust Agreement, the Trust shall administer three funds, for payment of Trust Expenses, Class Member Claims and Third Party Claims, to be known as "Fund I," "Fund II," and "Fund III." Fund I is primarily intended to pay expenses of, and claims against, the Trust during the first 25 years after Global Approval Judgment. Fund II is primarily intended to pay expenses of, and claims against, the Trust commencing 26 years after Global Approval Judgment, although it is available to pay expenses and claims commencing 21 years after Global Approval Judgment, if Fund I is insufficient for that purpose. Fund III is primarily intended to pay any expenses and claims not paid from Fund I or Fund II, commencing 46 years after Global Approval Judgment, although it is available to pay expenses and claims commencing 41 years after Global Approval Judgment if Fund II is exhausted prior to 46 years after Global Approval Judgment.

In order to assure that, to the maximum extent feasible, Trust resources are preserved and fairly allocated among all Beneficiaries (i.e., those who will have claims in the future as well as those who have claims now) Appendix 1 describes in detail how Trust surpluses realized in any Fiscal Year are to be preserved and limits amounts that can be spent in any Fiscal Year to pay claims from Funds I, II or III. In general, Appendix 1 specifies that payments for Trust Expenses, Class Member Claims and Third Party Claims may not exceed annual earnings on the assets within the relevant Fund plus a portion of the remaining principal (calculated by allocating remaining Fund principal equally over the years remaining in the Fund then in use). If any Surplus remains after payment of all Trust Expenses, Class Member Claims and Third Party Claims and certain indemnity expenses for a Fiscal Year (and after restoration of any increases in Principal Amount used in prior years as described below), such Surplus will either increase the Reserve Accunt or build Trust principal. This Reserve Account will be used to pay expenses of claims for any later year before Trustees may access any Increased Principal Amount to be used in that year. If, however, in any of the Fiscal Years 3 through 12 or 16 through 20 after Global Approval Judgment, the Earnings Amount and Principal Amount together with the funds contained in the Reserve Account in excess of $10,000,000 are not sufficient to pay Trust Expenses and to make all payments with respect to Class Member Claims or Third Party Claims for the first two Schedule Categories that are due or all payments with respect to Class Member Claims or Third Party Claims for the third Schedule Category that were due and unpaid on four consecutive prior Distribution Dates, the Trust may increase the usable portion of the Fund principal by up to 25% for any of Fiscal Years 3 through 12 after Global Approval Judgment or 12.5% for any of the Fiscal Years 16 through 20 after Global Approval Judgment.

1. Fund I.

a. **Commencement of Payments**. The Trust shall not pay any Class Member Claim or Third Party Claim (other than Extreme Hardship Claims and Expedited Review Claims) from Fund I until the Distribution Date first occurring after the end of the first Fiscal Year after Global Approval Judgment.

b. **Distributable Amount**. Total payments for Trust Expenses, Class Member Claims and Third Party Claims made from Fund I for any Fiscal Year (i.e., payments for Trust Expenses, Extreme Hardship Claims and Expedited Review Claims made during that Fiscal Year, together with payments for Class Member Claims and Third Party Claims for that Fiscal Year made on the Distribution Date immediately following that Fiscal Year) (other than any payments made from the Reserve Account) shall not exceed the Distributable Amount for that Fiscal Year. For the first Fiscal Year after Global Approval Judgment the Earnings Amount for Fund I shall be calculated from the date of Global Approval Judgment.

c. **Distribution of Remaining Balance**. The transfer from Fund I to Fund II of any remaining balance in Fund I shall occur on the earlier of (i) the day after the Distribution Date for the twenty-fifth Fiscal Year after Global Approval Judgment, or (ii) the day before the Distribution Date for the first Fiscal Year occurring after the twentieth Fiscal Year after Global Approval Judgment in which the maximum possible

Distributable Amount is less than the Earnings Amount and the Principal Amount that were in effect for Fund I for the twentieth Fiscal Year after Global Approval Judgment, the Trust shall transfer such remaining balance and the remaining balance of the Reserve Account to Fund II, at which time payments out of Fund II shall commence as provided in Section E.2.

2. **Fund II.**

a, **Commencement of Payments.** No payments shall be made from Fund II until the Distribution Date for the twenty-first Fiscal Year after Global Approval Judgment. If at that time Fund I still has money left to pay Trust Expenses, Class Member Claims or Third Party Claims, no payments shall be made from Fund II until the earlier of: (1) the day after the Distribution Date for the twenty-fifth Fiscal Year after Global Approval Judgment; or (2) the Fiscal Year in which the Distribution Date referred to in Section E.1.c.(ii) occurs.

b. **Distributable Amount.** The total amount of payments for Trust Expenses, Class Member Claims and Third Party Claims made from Fund II for any Fiscal Year is limited to the Distributable Amount for that Fiscal Year.

c. **Distribution of Remaining Balance.** The transfer from Fund II to Fund III of any remaining balance in Fund II shall occur on (i) the day after the Distribution Date for the twentieth Fiscal Year after the transfer of the balance in Fund I to Fund II pursuant to Section E.1.c., or (ii) such later date as the Trustees determine would be in the best interests of all Beneficiaries, both present and future (but in no event later than the day after the Distribution Date for the forty-fifth Fiscal Year after Global Approval Judgment); at which time payments out of Fund III shall commence as provided in Section E.3.

3. **Fund III.**

a. **Commencement of Payments.** No payments shall be made from Fund III until the Distribution Date for the forty-first Fiscal Year after Global Approval Judgment. If at that time Fund II still has money left to pay Trust Expenses, Class Member Claims or Third Party Claims, no payments shall be made from Fund III until the date Fund II is exhausted or the balance of Fund II has been transferred into Fund III pursuant to Section E.2.c.

b. **Distributable Amount.** The total amount of payments for Trust Expenses, Class Member Claims and Third Party Claims made from Fund III for any Fiscal Year is limited to the Distributable Amount for that Fiscal Year.

c. **Distribution of Remaining Balance.** If there is a remaining balance in Fund III on the day after the Distribution Date for the sixty-first Fiscal Year after Global Approval Judgment, and there are then, or are anticipated by the Trustees to be in the future, any Trust Expenses, Class Member Claims, Third Party Claims and other obligations of the Trust which have not yet been liquidated and/or fully paid, the Trust shall use the remaining balance of Fund III to pay such Trust Expenses, Class Member Claims, Third Party Claims and other obligations of the Trust. Upon the occurrence of the Termination Date, the Trust shall apply any remaining balance of Fund III to such charitable purposes as the Trustees in their reasonable discretion, after consultation with the SCB, shall determine, which charitable purposes, if practicable, shall be related to occupational health.

4. **Determination of Distributable Amount for Each Fund.** Within 90 days following the end of each Fiscal Year after Global Approval Judgment, the Trust shall determine the Distributable Amount for such Fiscal Year, which Distributable Amount (after payment of Trust Expenses, Extreme Hardship Claims and Expedited Review Claims for such Fiscal Year) shall be distributed to pay Class Member Claims and Third Party Claims, in the order set forth in Section F.2, on a date, no later than 120 days following the end of each such Fiscal Year, chosen by the Trust (the "Distribution Date").

F. Order, Timing and Limitations on Payments of Claims.

1. **Eligibility for Payment.** All Class Member Claims and Third Party Claims become eligible to begin receiving payments from the Trust on the Distribution Date immediately following the Fiscal Year in which such Class Member Claims or Third Party Claims are Liquidated, provided that in the case of settled Class Member Claims the Trust has received the release required by Section B.4. Judgments obtained in the tort system shall be eligible for payment in the same order as Claims Liquidated by settlement or arbitration, except as provided in Section F.3.b, and shall be treated as having been Liquidated on the date the claimant obtains a final, nonappealable judgment, except that upon an unsuccessful appeal by the Trust, the date of Liquidation shall be the date of the trial court judgment.

2. **Order of Payment.** On each Distribution Date, the Trust shall make pay-ments on Liquidated Class Member Claims and Third Party Claims in the following order: (1) claims for Mesothelioma and Lung Cancer; (2) claims for Other Cancer and Asbestos Lung Disease I; (3) the first payment on claims for Asbestos Lung Disease II which was due and unpaid

on four or more consecutive prior Distribution Dates, (4) the second payment on claims for Asbestos Lung Disease II which was originally due and unpaid on four or more consecutive prior Distribution Dates; (5) the third payment for claims on Asbestos Lung Disease II which was originally due and unpaid on four or more consecutive prior Distribution Dates; (6) any other payments on claims for Asbestos Lung Disease II; and (7) Residual Claims. While it is anticipated that the Trust will be able to pay all Liquidated Class Member Claims and Third Party Claims on each Distribution Date, all payments due on Liquidated claims for Mesothelioma and Lung Cancer must be made before any payments due on Liquidated claims for Asbestos Lung Disease I and Other Cancer may be made, all payments due on Liquidated claims for Asbestos Lung Disease I and Other Cancer must be made before any payments due on Liquidated claims for Asbestos Lung Disease II may be made, the first payment on Liquidated claims for Asbestos Lung Disease II which was due and unpaid on four or more consecutive prior Distribution Dates must be made before any other payments for other Liquidated claims for Asbestos Lung Disease II may be made, the second payment on Liquidated claims for Asbestos Lung Disease II which was originally due and unpaid on four or more consecutive prior Distribution Dates must be made before any other payments for other Liquidated claims for Asbestos Lung Disease II may be made, the third payment on Liquidated claims for Asbestos Lung Disease II which was originally due and unpaid on four or more consecutive prior Distribution Dates must be made before any other payments for other Liquidated claims for Asbestos Lung Disease II and all other payments due on Liquidated claims for Asbestos Lung Disease II must be made before any payments due on Liquidated Residual Claims may be made. Within each of the seven categories, payments due on Class Member Claims and Third Party Claims shall be made in FIFO order based on when the Class Member Claims and Third Party Claims were Liquidated, whether by settlement, arbitration or judgment, except that settled Class Member Claims shall be ordered within each such category according to when the release required by Section B.4 is received by the Trust. Other than by virtue of subrogation to a Class Member Claim pursuant to Section H.5.a, no contribution claim brought by a Defendant Class Member shall be paid inasmuch as resolution of a Class Member Claim against the Trust gives rise to a right of set-off or reduction under Section H.1.a of the Trust Distribution Process sufficient to satisfy, and bar the assertion of, any such contribution claim against the Trust.

3. Terms of Payment.

a. Claims Resolved Outside the Tort System. Class Member Claims resolved without filing an action against the Trust in the tort system and all Third Party Claims shall be eligible for payment over a three-year period, 40% due on the Distribution Date immediately following the Fiscal Year in which such claim was Liquidated and 30% due on each of the next two Distribution Dates, except for Expedited Review Claims paid pursuant to Section B.2 and Extreme Hardship Claims paid pursuant to Section B.8 of this Trust Distribution Process.

b. Claims Resolved in the Tort System.

(i) Class Member Claims resolved after the filing of an action against the Trust in the tort system shall be eligible for payment on the following schedule. On the Distribution Date following the Fiscal Year in which such a claim was Liquidated, the Beneficiary shall be eligible to receive the lesser of: (1) 100% of the last settlement offer made by the

Trust before the Beneficiary filed an action against the Trust in the tort system, or 100% of the proposed Award in nonbinding arbitration with the Trust pursuant to Section C, whichever is greater; and (2) 40% of the amount of the judgment or settlement after the action was filed. The remaining balance of the judgment or settlement shall be eligible for payment on the Distribution Dates following the next four Fiscal Years in equal installments so long as each such installment does not exceed $50,000. In the even that each such installment would exceed $50,000, the Beneficiary shall be eligible to receive $50,000 per year until the Class Member Claims is fully paid. In the event that any resulting judgment is less than the proposed Award in nonbinding arbitration with the Trust pursuant to Section C, the Trust shall be entitled to recover as a cost of litigation and deduct from the judgment its cost of mediation and arbitration pursuant to the procedures set forth in Section C.

(ii) Notwithstanding the foregoing, in order to prevent evasion or abuse of the ADR provisions of this Trust Distribution Process, to conserve the assets of the Trust for the benefit of all Beneficiaries, and to manage prudently the cash flow of the Trust in a manner consistent with Section E of this Trust Distribution Process, the Trustees shall have the discretion, in any instance in which the Beneficiaries' judgments against the Trust result from a trial of the claims of more than 15 such Beneficiaries, to pay such judgments in such manner and over such a longer time period (not to exceed 10 years) as the Trustees shall determine is in the best interests of the Trust and of all Beneficiaries.

4. **Deferral of Payments**. All Class Member Claims or Third Party Claims eli-gible for a payment on a Distribution Date which do not receive that payment on that Date because the Distributable Amount for the Fiscal Year has been exhausted

shall have that payment deferred until the following Distribution Date. Any payment obligation so deferred shall retain its position in the FIFO queue as set forth in Section F.2 and shall be accorded priority as set forth in Section F.2. Deferrals may continue from year to year until the Distributable Amount is sufficient to make the payments due on deferred obligations.

5. **Limitation on Payment of Claims.** Aggregate payments on account of Class Member Claims and Third Party Claims arising from any one individual's exposure to asbestos shall not total more than $500,000, whether the Class Member Claim or Third Party Claim is Liquidated through settlement, mediation, arbitration or in the tort system. Any individual with asbestos-related disease shall be deemed to be a separate exposure for purposes of this section.

G. All Claims Resolved Pursuant to the Trust Distribution Process.

In order to conserve the assets of the Trust, all Claimants are enjoined from filing future litigation based on or arising out of a Class Member Claim or Third Party Claim against the Fibreboard, Continental or Pacific Releasees. Any such claim may only be pursued against the Trust as provided in this Trust Distribution Process.

H. Defendant Class Member Procedures.

Pursuant to the Defendant Class Settlement Agreement, and except as otherwise provided herein, (a) Defendant Class Members are releasing Third Party Claims against the Trust, Fibreboard Releasees, Continental Releasees and Pacific Releasees (except that nothing in this Trust Distribution Process or the Defendant Class Settlement

Agreement shall be read as releasing, or be deemed to release, any claims whatsoever Defendant Class Members may have against the Continental Releasees and Pacific Releasees other than those arising out of, or in any way predicated upon obligations created by, the Insurance Policies); (b) Fibreboard Corporation and the Trust are releasing contribution and indemnity claims arising out of Class Member Claims; and (c) the Continental Releasees and Pacific Releasees are releasing any claims (except for reinsurance claims) arising out of Class Member Claims they may have against Defendant Class Members; provided, however, that Defendant Class Members shall have rights against the Trust and the Trust shall succeed to Fibreboard's rights against Defendant Class Members to the extent provided for under this Trust Distribution Process. Without enlarging any substantive rights accorded them by this Trust Distribution Process, Defendant Class Members shall have such procedural rights (relating to procedural issues not expressly dealt with by this Trust Distribution Process) reasonably necessary to pursue or defend rights accorded them by this Trust Distribution Process. Class Member Claims against the Trust to which Defendant Class Members succeed shall be governed by this Section H of the Trust Distribution Process. Settlement Class Members, Fibreboard Corporation, Continental, Pacific and the Trust are bound by the terms of this Section and must abide by the following procedures in connection with suits by Settlement Class Members for asbestos-related injury or disease against Defendant Class Members.

1. Claims Liquidated Before Judgment Against Defendant Class Members.

a. Calculation of Set-Off Amount. If a Settlement Class Member Liquidates his or her Class Member

Claim against the Trust before judgment is rendered in litigation between the Settlement Class Member and Defendant Class Member(s), the Trust (itself or in Fibreboard Corporation's stead) shall be deemed, in such ongoing litigation, to be (i) a settled defendant within the meaning of the law which governs the judgment entered by the trial court (or any underlying verdict) (the "Judgment Forum Law") and (ii) a legally responsible joint tortfeasor under Judgment Forum Law, without introduction of further proof. Any judgment obtained by a Settlement Class Member against Defendant Class Member(s) shall be reduced or set off to reflect the Settlement Class Member's settlement with the Trust in the manner (whether pro tanto, pro rata, jury allocation or apportionment or otherwise), and in the amount provided for under Judgment Forum Law. Where the dollar amount of the settlement between the Trust and the Settlement Class Member is relevant to the calculation of any such reduction or set off, that dollar amount shall be the total amount agreed to by the Settlement Class Member and the Trust in settlement of the Class Member Claim, including all sums paid and agreed to be paid, without any reduction to present value for claims paid or to be paid within three years of Liquidation. For that portion of any claim not to be paid within three years of Liquidation, the amount of reduction or set off will be calculated at present value as of the end of that three year period. Trust estimates as to the length of time likely to elapse before future payments will be made will be binding on Defendant Class Members and Settlement Class Members alike. Where the judgment against the Defendant Class Member(s) resolves only a portion of the Class Member Claim or potential Class Member Claim that the Class Member has settled with the Trust (for example, personal injury as distinct from wrongful death claims), the dollar amount of the settlement between the Trust and the Settlement Class Member used in calculation of any reduction or set off shall reflect any apportionment made by the Trust and the Settlement Class Member reasonably and in good faith with regard to rights of the Defendant Class Members under this Trust Distribution Process, provided (i) that Defendant Class Members shall retain any rights available to them under Judgment Forum Law to challenge such apportionment, and (ii) that wherever Judgment Forum Law calls for apportionment of economic and non-economic damages, the value assigned to the Trust's settlement of a Class Member Claim shall be allocated between economic and non-economic damages in the same proportion that the subsequent judgment or underlying verdict against Defendant Class Member(s) allocates such damages, notwithstanding any apportionment set forth in the settlement documents.

b. Status of the Trust at Trial. The Settlement Class Member and the Trust shall consent to any procedures required in order to enable the trial court to establish the amount of any judgment reduction or set off in respect of a Trust settlement as if the Trust, itself or in Fibreboard Corporation's stead, had been a party to the litigation prior to settlement. Should a trial court require that the Trust or Fibreboard Corporation be a party in order to establish such amount, no objection shall be made by the Trust or the Settlement Class Member to the filing by Defendant Class Member(s) of a third-party complaint or to the joinder of the Trust, for itself or in Fibreboard Corporation's stead, as a party for this limited purpose only. The Trust, if made a party, shall not be required to enter an appearance, be subject to discovery as a party, or be subject to default or other trial court process or procedure. Under no circumstances shall Fibreboard Corporation or the Insurers be made parties for any purpose.

c. Discovery and Informational Issues. The Trust shall comply with the rules of discovery under Judgment

Forum Law concerning requests for product exposure and disease information provided by the Settlement class Member pertaining to such Class Member Claim. In response to a Defendant Class Member request, the Trust and the Settlement Class Member shall promptly verify, no later than the start of jury selection in the trial of an action by the Settlement Class Member against the Defendant Class Member, the fact of the settlement; and in accordance with Judgment Forum Law, also shall provide information regarding the amount and terms of any such settlement of a Class Member Claim. Without waiver by the Trust or Settlement Class Members of their rights to object to discovery of such information, neither product exposure nor disease information provided pursuant to this Subsection H.1.c shall be considered inadmissible at trial based on Rule 408 of the Federal Rules of Evidence or any of its state law counterparts.

2. Claims Not Liquidated When Verdict or Judgment Obtained Against Defendant Class Members.

a. Effect of Verdict or Judgment. Except as provided in Section H.2.b. and Section H.3, if a Settlement Class Member goes to judgment or verdict against one or more Defendant Class Members without having Liquidated his or her Class Member Claim against the Trust, the Settlement Class Member forever waives and releases that portion of his or her Class Member Claim against the Trust which would have been determined (under principles of Judgment Forum Law unaffected by Global Approval Judgment) by the verdict or judgment had the Trust for itself or in Fibreboard Corporation's stead been a judgment defendant.

b. Retention of Several Liability Clai Notwithstanding any other provision of Section H.2, where (under principles of Judgment Forum Law unaffected by Global Approval Judgment) the Trust's liability to a Settlement Class Member would be several only, or where the Trust's liability as to a particular category of damages (for example, non-economic damages) would be several only, a Settlement Class Member shall retain that several-only aspect of his or her claim against the Trust, even if the Settlement Class Member goes to judgment or verdict against a Defendant Class Member without having Liquidated his or her Class Member Claim. However, no aspect of the Class Member Claim to which principles of joint or joint and several liability would apply shall be so retained. Should the Trust thereafter settle with the Settlement Class Member based only on the Trust's several liability, the release shall state that Third Party Claims based on joint, or joint and several, liability are not barred by virtue of the several liability settlement and may be pursued in accordance with the provisions of this Trust Distribution Process.

c. **Payment of Verdict or Judgment.** Upon payment of a verdict or judgment returned prior to Liquidation of the underlying Class Member Claim, the Defendant Class Member(s) shall succeed in all respects to that portion of the Class Member Claim against the Trust which would have been determined (under principles of Judgment Forum Law unaffected by Global Approval Judgment) by the judgment in the action against the Defendant Class Member had the Trust for itself or Fibreboard Corporation's stead been a judgment defendant, except to the extent provided in Sections H.2.b and H.5 hereof, and may pursue such Class Member Claim in accordance with this Trust Distribution Process. Notwithstanding any contrary provisions of Judgment Forum Law, a Class Member Claim to which a Defendant Class Member may succeed under this subsection upon payment of a verdict or judgment shall not be lost or extinguished by virtue of a Defendant Class Member's settlement with a Settlement Class Member reached after a contested trial resulting in verdict, or a verdict or jury or court fact finding as to damages or judgments.

3. Tort System Claims Against the Trust.

Should a Settlement Class Member proceed to litigation against the Trust pursuant to Section D of this Trust Distribution Process, no objection shall be made in such tort system cases by the Trust or the Settlement Class Member to the filing by Defendant Class Member(s) of a third-party or cross-complaint against the Trust as successor to Fibreboard Corporation under the Global Approval Judgment. Without in any way waiving or limiting the provisions of this Trust Distribution Process limiting the Trust's liabilities with respect to Class Member Claims and Third Party Claims when a Class Member Claim proceeds to litigation against the Trust in the tort system pursuant to Section D, Defendant Class Members shall retain against the Trust whatever rights of contribution and/or indemnification they otherwise would have had against Fibreboard Corporation under Judgment Forum Law and the Trust shall retain whatever Fibreboard Corporation rights of contribution and/or indemnification it would have had against Defendant Class Members under Judgment Forum Law. In the event that after a verdict or judgment against a Defendant Class Member, the Defendant Class Member upon assertion of its rights is determined to have a valid contribution claim or indemnity claim against Fibreboard or the Trust under Judgment Forum Law, the Settlement Class Member's verdict or judgment against the Defendant Class Member shall be reduced or set off in the amount necessary under Judgment Forum Law to satisfy such Defendant Class Member's claim for contribution or indemnity against Fibreboard or the Trust. Nothing in this Section H.3 or in Section H.2.a shall prevent the Settlement Class Member from liquidating and collection pursuant to other provisions of Section D of this Trust Distribution Process his or her claim against the Trust based on the verdict or judgment referred to in this Section H.3.

4. Litigation Between Defendant Class Members and Settlement Class Members.

In any litigation between Defendant Class Members and Settlement Class Members each shall retain their respective rights under Judgment Forum Law to introduce evidence at trial.

Under no circumstances (other than the commencement by the Trust of formal bankruptcy or insolvency proceedings) shall the Trust (or Fibreboard Corporation) be treated as a bankrupt or insolvent defendant, nor shall the Trust (or Fibreboard Corporation) be considered, for purposes of litigation between Defendant Class Members and Settlement Class Members only, a person who cannot be made a party for lack of personal jurisdiction, or otherwise a party over whom a Settlement Class Member is unable to obtain judgment.

5. Pursuit of Third Party Claims.

a. Defendant Class Member to Stand in Settlement Class

Member's Stead.

In pursuing any Class Member Claim against the Trust to which a Defendant Class Member has succeeded under subsection H.2.c above, (i) the Defendant Class Member shall stand in the stead of the Settlement Class Member in respect of whose Class Member Claim the Defendant Class Member has succeeded, (ii) such Class Member Claim shall be resolved by Defendant Class Members under this Trust Distribution Process in the same manner as such Class Member Claim would have been resolved had it been asserted by the Settlement Class Member, and (iii) it shall be evaluated on the same basis as if the Settlement Class Member directly presented his or her Class Member Claim to the Trust, without any enhancement, discount or limitation because it is asserted by a Defendant Class Member. Defendant Class Members must present evidence of such Class Member Claims in the same manner as Settlement Class Members; provided, however, that Defendant Class Members are not required to provide information unavailable to them because such information is solely within the control of the Settlement Class Member. In any event, however, Defendant Class Member Claims are to be evaluated by the same standards as Class Member Claims. For the limited purpose of pursuing Class Member Claims, or otherwise in respect of assertion of other rights specifically granted under this Trust Distribution Process, Defendant Class Members shall be treated as beneficiaries of the Trust; provided, however, that under no circumstances shall Section H.6 below apply to Class Member Claims to which Defendant Class Member have succeeded.

b. Resolution of Claims. Notwithstanding any other provision of this subsection, Class Member Claims to which Defendant Class Members have succeeded under Section H.2.c hereof or Residual Claims shall be decided by binding arbitration under Section C.2 of this Trust Distribution Process, if not settled previously, and may not exit to the tort system. In such arbitration and in its negotiations with Defendant Class Members, the Trust shall not assert any Fibreboard Corporation defenses based on the state of the art, or failure to show negligence or product defect (whether based upon design, manufacture or failure to warn), except in those circumstances under which the Trust would also have asserted those defenses against the Settlement Class Member to whose Class Member Claim the Defendant Class Member has succeeded. Moreover, the Trust shall not assert failure to show negligence or product defect as a defense where a Class Member Claim to which the Defendant Class Member has succeeded is brought by a former manufacturer and/or distributor of asbestos-containing high-temperature pipe and block insulation, if the issues of product defect or negligence (as the case may be) covering such pipe and block insulation were fully litigated to an adverse result against that Defendant Class Member at trial of the underlying asbestos-related personal injury action. Under no other circumstances shall the results of such trial be given preclusive effect in any such arbitration. Any arbitration under this subsection shall be confidential, and no statement made, or contention advanced, at such arbitration shall be introduced as evidence or otherwise used against the maker or proponent of such statement or contention in the course of any proceeding other than arbitration under this Trust Distribution Process.

c. **Processing and Payment of Claims.** Class Member Claims to which Defendant Class Members have succeeded shall be included in the FIFO queue established pursuant to this Trust Distribution Process. For purposes of processing, the position of a Class Member Claim to which a Defendant Class Member has succeeded in the FIFO queue shall be determined by the earlier of (a) the date the Settlement Class Member filed with the Trust the underlying Class Member Claim or (b) the date on which the Defendant Class Member paid the Settlement Class Member with respect to the judgment or verdict. For purposes of payment, a Class Member Claim to which a Defendant Class Member has succeeded will be placed within the appropriate Schedule Category set forth in Section F.2 and, within such category, in FIFO order, based on the date on which the Defendant Class Member paid the Settlement Class Member in respect to the judgment or verdict. Class Member Claims to which Defendant Class Members have succeeded, shall be paid under the terms set forth in Section F.3.a. Prior to receiving payment the Defendant Class Member shall have provided a release as described in Section B.4.

d. **Multiple Claims or Multiple Third Party Claims.** Where Defendant Class Members succeed to a portion of a Class Member Claim by virtue of payment with respect to any verdict or judgment where a Beneficiary retains an interest in the several liability aspect of the same Class

Member Claim (regardless of the number of Defendant Class Members who may have succeeded to portions of the Class Member Claim) ("Partial Claims"), Settlement Class Members and Defendant Class Members shall comply with procedures established by the Trust to ensure that all persons with rights under this Trust Distribution Process in respect of the same Class Member Claim coordinate their efforts so that all such Partial Claims can be processed and Liquidated in a single proceeding, designed to resolve all elements of such claims, whether malignancy or non-malignancy, and all causes of action, whether for personal injury, death, loss of consortium, or otherwise against the Trust; provided, however, that nothing in the foregoing shall prevent the Trust, a Settlement Class Member or a Defendant Class Member, as the case may be, from electing to give or take a limited, non-malignancy release under this Trust Distribution Process. In evaluating Partial Claims in the course of such a single proceeding, the Trust shall not differentiate among the aspects of such claims based on whether the right to payment is asserted by a Settlement Class Member or Defendant Class Member. In those circumstances where different parties (whether Settlement Class Member and Defendant Class Member(s), or more than one Defendant Class Member) assert rights under this Trust Distribution Process in respect of the same Class Member Claim, any dispute regarding such Class Member Claim shall be presented in a single arbitration. Should more than one Defendant Class Member be entitled to payment from a single settlement or award by the Trust, the Defendant Class Members shall share such amount in the same proportion that each made payments to the Settlement Class Member. Notwithstanding the above or any other provision of this Trust Distribution Process, (i) a Settlement Class Member shall not be entitled to take to the tort system a Class Member Claim if any portion of that claim was resolved as to a Defendant Class Member by settlement or in binding arbitration pursuant to Section H.5.b of this Trust Distribution Process; and (ii) Settlement Class Members retain all rights to resolve their Partial Claims with the Trust after the verdict or judgment against the Defendant Class Member and before one or more Defendant Class Member's related Partial Claim(s) is submitted to the Trust in writing for resolution; provided, however, that the Settlement Class Member's resolution of his or her Partial Claim shall not bind any Defendant Class Members or the Trust with respect to any Defendant Class Member's related Partial Claim. The Trust shall settle Partial Claims only in accordance with Section H.5.d-g.

e. If a Settlement Class Member resolves his or her Partial Claim pursuant to Section H.5.d, the Trust or arbitrator will apportion the settlement or award among all elements of the claims that are being resolved (for example, personal injury, wrongful death, loss of consortium, etc.). Until such time as the Partial Claim of a Defendant Class Member has been Liquidated and paid or denied, the related Partial Claim of a Settlement Class Member Liquidated under Section H.5.d(ii) shall only be entitled to payment of

(i) that portion of the Settlement Class Member's Partial Claim allocated to resolve claims which were not included in the verdict or judgment against the Defendant Class Member, plus

(ii) $500,000 minus the amount in (i), multiplied by the ratio of (x) the several liability portion of the verdict or judgment against the Defendant Class Member to (y) the total underlying verdict or judgment against the Defendant Class Member. Any award of punitive or exemplary damages will be excluded from the verdict or judgment against the Defendant Class Member when calculating (x) or (y).

f. The provisions of Section H.5.e shall not apply if the underlying total verdict or judgment in favor of a

Settlement Class Member against one or more Defendant Class Members (excluding any award for punitive or exemplary damages) is $500,000 or less.

g. The provisions of Section H.5.e will cease to apply if the Partial Claim of a Settlement Class Member plus the related Partial Claims of all Defendant Class Members are Liquidated for a total of $500,000 or less.

h. The provisions of Section H.5.e will cease to apply as to any Partial Claim of a Defendant Class Member which is not submitted to the Trust and served on the Settlement Class Member, or his attorney, if any, within three months of the date on which the underlying judgment against the Defendant Class Member becomes final.

6. **Cooperation for Court Approvals.** Upon liquidation of his or her Class Member Claim, each Beneficiary shall cooperate with the Trust in seeking any needed trial court approval under Judgment Forum Law of the settlement.

7. **No Modification Without Consent.** Neither the terms of this Section H nor as they apply to Defendant Class Members the provisions of this Trust Distribution Process as to arbitration may be modified without the written concurrence of the Representative Defendant. Other provisions of the Trust Distribution Process may be modified (after prior notice to the Representative Defendant) without the concurrence of the Representative Defendant unless the modification (i) has an adverse effect on Defendant Class Members and (ii) discriminates against them vis-a-vis Settlement Class Members, in which case the modification shall require the written concurrence of the Representative Defendant.

I. Attorneys' Fees.

Attorneys' fees payable in connection with Class Member Claims Liquidated and paid through the Trust Distribution Process, whether as a result of settlement, an arbitration award, or a judgment obtained in the tort system, and whether or not calculated as a percentage of recovery, shall be the lower of the fee provided in the contract between the Beneficiary and counsel and 25%. Costs related to the prosecution of the claim shall be subtracted from the recovery before calculating the attorney's fee. Legal fees shall be paid pro rata from the payments due to the Beneficiaries as such payments are made by the Trust.

J. Amendment.

No amendments or waivers of this Trust Distribution Process will be permitted except as set forth in Section 3.1 of the Trust Agreement.

APPENDIX U

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Civil Action No. 6:93cv______

New Orleans, Louisiana

GERALD AHERN, JAMES *
DENNIS and *
CHARLES W. JEEP, On Behalf of *
Themselves and Others *
Similarly Situated *
*
Plaintiffs *
*
v. * September 9, 1993
*
FIBREBOARD CORPORATION * 6:00 p.m.
*
Defendant *
*
CONTINENTAL CASUALTY *
COMPANY *
and *
PACIFIC INDEMNITY COMPANY *
*
Intervenors *

EXCERPT FROM THE TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE ROBERT M. PARKER UNITED STATES DISTRICT COURT PRESIDING

Page 10, Lines 1-25

MR. WACHTELL: Your Honor, in order to show cause or the order granting the temporary restraining order and setting the preliminary injunction down for hearing, we have referred to a list of lawyers who have regularly represented asbestos claimants. It is a list to whom we contemplate giving notice as specified in the order, and I want to file that list with the Court.

THE COURT: Very well. Let me inquire of Bill Parker, is it your intention to return to Tyler this evening?

MR. PARKER: Yes, sir.

THE COURT: You are hereby designated a deputy district clerk of the Eastern District of Texas, and I will entrust the original of the papers to you, if you deliver them to Ms. Thompson, then, at 9:00 in the morning.

MR. PARKER: I will do so.

MR. INSELBUCH: If I could just add for the record, the service list of counsel is the service list that the Manville Personal Injury Settlement Trust uses, and it is my understanding that that list includes every lawyer who has filed a claim on behalf of a claimant before that Trust, and as far as we are all aware it is the most complete list that we could put together.

THE COURT: Thank you, counsel. Gentlemen, let me mention one other thing. You are all aware of the fact that I think our country, more than